S. HRG. 114–27

LEGISLATIVE HEARING ON S. 1140, THE FEDERAL WATER QUALITY PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MAY 19, 2015

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C O N T E N T S

LEGISLATIVE HEARING ON S. 1140, THE FEDERAL WATER QUALITY PROTECTION ACT

TUESDAY, MAY 19, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,
Washington, DC.

The committee met, pursuant to notice, at 10:02 a.m. in room 406, Dirksen Senate Building, Hon. Dan Sullivan (chairman of the subcommittee) presiding.

Present: Senators Sullivan, Barrasso, Capito, Boozman, Sessions, Fischer, Rounds, Whitehouse, Gillibrand, and Markey.

OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA

Senator SULLIVAN. The Subcommittee on Fisheries, Water, and Wildlife will now come to order.

Thank you to all of you for your attendance here this morning on an important bipartisan bill offered by my colleague Senator Barrasso.

I am proud to be an original co-sponsor of S. 1140, The Federal Water Quality Protection Act, as this bill would address many of the concerns we have all been hearing regarding the EPA and Army Corps' proposed Waters of the United States Rule or the WOTUS rule.

Over the last few months, we have held several hearings, including two field hearings in Alaska, on the proposed rule where we heard testimony from a variety of witnesses including the EPA Administrator, Assistant Secretary of the Army, State and local government representatives, as well as other stakeholders.

This bill is a continuation of those efforts and would require the agencies to withdraw the current proposed WOTUS rule and issue a revised rule proposal that adheres to a series of principles delineated by Congress, only after completing numerous procedural requirements bypassed the first time around.

In our first hearing on this issue, I asked the EPA Administrator McCarthy to share with me the agency's internal analysis justifying this rule. I am still waiting for a response. It was a simple request and I believe it is outrageous that the EPA cannot issue a legal opinion citing the legal justification for this rule.

It would be useful for the EPA Administrator to not only address that legal justification of that rule but the front page article in the New York Times today on accusations that the EPA is violating the anti-Federal lobbying law in relation to this rule. It would be good

to have both of those legal analyses from the EPA as soon as possible.

Three-fifths of the States oppose the proposed WOTUS rule along with more than 300 trade groups and associations from across the Country. While it is Congress' job to prevent this massive expansion of Federal jurisdiction, we must do it in a way that protects our waters and allows States the opportunity to fulfill their roles as co-regulators under the Clean Water Act.

A huge percentage of Alaska already falls under Federal Clean Water Act jurisdiction. This means that those building or doing business on or near these waters have to wrangle with the Federal Government to obtain costly permits and approvals.

While there is no doubt that many of these waters, such as the Yukon and Kuskokwim Rivers, and their tributaries, are clearly jurisdictional under the Clean Water Act. The proposed rule seeks to go further and would encompass many waters that Congress never intended to be jurisdictional.

This massive expansion of Federal authority will have harsh consequences for not only those who are trying to develop the land but State and local governments charged with protecting their own unique resources. It is also an expansion of Clean Water Act jurisdiction that I believe only Congress can grant.

Alaska has some of the cleanest waterways in the world resulting in vibrant, world class fisheries and award-winning drinking water. We need to ensure that any effort to clarify Federal jurisdiction under the Clean Water Act does not jeopardize these characteristics that are so fundamental to the identity of Alaska and other States throughout the Country.

Today we are here to discuss a bipartisan bill that would not only help to clarify jurisdiction and prevent unlawful Federal overreach, but it would also help to ensure that the protection of Alaska's precious resources remain in the hands of those who live near and rely on them.

Thank you all again for being here this morning and I look forward to hearing from our witnesses.

I yield the remainder of my time to my colleague, Senator Barrasso.

[The prepared statement of Senator Sullivan follows:]

STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR
FROM THE STATE OF ALASKA

Good morning and thank you all for being here today to discuss an important bipartisan bill, offered by my colleague Senator Barrasso. I am proud to be an original cosponsor of S. 1140, The Federal Water Quality Protection Act, as this bill would address many of the concerns we've all been hearing regarding the EPA and Army Corps' proposed "waters of the United States" rule.

Over the last few months, we have held several hearings, including two in Alaska, on the proposed rule where we heard testimony from a variety of witnesses including the EPA Administrator, Assistant Secretary of the Army, State and local government representatives, as well as other stakeholders. This bill is a continuation of those efforts and would require the agencies to withdraw the current proposed rule and issue a revised proposal that adheres to a series of principles, only after completing numerous procedural requirements bypassed the first time around.

Three-fifths of the States oppose the proposed rule along with more than 300 trade groups and associations from across the country. While it is Congress's job to prevent this massive expansion of Federal jurisdiction, we must do it in a way that protects our waters and allows States the opportunity to fulfill their roles as co-regulators under the Clean Water Act (CWA).

A huge percentage of Alaska already falls under Federal CWA jurisdiction. This means that those building or doing business on or near these waters have to wrangle with the Federal Government to obtain costly permits and approval. While there is no doubt that many of these waters, such as the Yukon, Kuskokwim, and Susitna rivers, and their tributaries, are clearly jurisdictional under the Clean Water Act, the proposed rule seeks to go further and would encompass many waters that Congress never intended to be jurisdictional. This massive expansion of Federal authority will have harsh consequences for not only industry but State and local governments charged with protecting their own unique resources.

Alaska has some of the cleanest waterways in the world resulting in vibrant, world class fisheries and award-winning drinking water. We need to ensure that any effort to clarify Federal jurisdiction under the CWA does not jeopardize these characteristics that are so fundamental to the identity of Alaska.

Today we are here to discuss a bipartisan bill that would not only help to clarify jurisdiction and prevent unlawful Federal overreach, but it would also help to ensure that the protection of Alaska's precious resources remains in the hands of those who live near and rely on them.

Thank you all again for being here this morning and I look forward to hearing from our witnesses.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman.

I want to tell you how much I appreciate your holding this hearing today, as you said, on a bipartisan environmental protection piece of legislation.

S. 1140, The Federal Water Quality Protection Act, is legislation I introduced, along with Senators Donnelly, Heitkamp, Manchin, along with others members of this committee, including you, Mr. Chairman, that will protect our Nation's navigable waterways and our pristine wetlands.

This bill is a testament to the hard work that both sides of the aisle have done in achieving an agreement on a comprehensive environmental protection bill.

I would like to thank Chairman Inhofe and other co-sponsors for showing environmental legislation to protection our air, land and water can be introduced in this committee in a bipartisan way.

I think it bodes well for the future and I look forward to continuing to work with our colleagues on both sides of the aisle who want to get work done for the American people.

With regard to this legislation, it is the subject of today's hearing. I would like to say that our rivers, lakes, wetlands and other waterways are among America's most treasured resources. In my home State of Wyoming, we have some of the most beautiful rivers in the world such as the Snake River, the Wind River and dozens of others.

The people of Wyoming are devoted to keeping these waterways safe and pristine for our children and grandchildren. We understand that there is a right way and a wrong way to do it. It is possible to have reasonable regulations to help preserve our waterways while still allowing them to be used as natural resources.

Rather than wait for a rule that likely will not represent the interests of farmers, ranchers, families, communities, let us move forward with a bipartisan, Federal Water Quality Protection Act to assure the people that we hear and understand their concerns.

Thank you, Mr. Chairman. I look forward to the testimony.

Senator SULLIVAN. Thank you, Senator Barrasso.

I now want to recognize Ranking Member Whitehouse for his opening statement.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Once again we are here to consider a Republican attack against environmental protection. It is becoming a recurring theme.

This is an attempt to kill the proposed rule by EPA and the Army Corps of Engineers under the Clean Water Act. The so-called Federal Water Quality Protection Act, an ironic name if there ever was one, would prohibit EPA from finalizing any change to its regulations until it conducts a new 120-day comment period, responds to all comments received on the current rulemaking which number in the millions, carries out a 180-day consultation with State and local governments, conducts analyses under five different statutes and Executive Orders and reports to Congress.

The EPA rule is based on sound, scientific analysis. In my home State of Rhode Island, this rule is going to protect our environment and support our economy. Small streams and wetlands are vital for fish and wildlife and Rhode Island's vibrant recreational industry.

The U.S. Fish and Wildlife Service reports that Rhode Island residents and non-residents spent $360 million on wildlife recreation, including $130 million on fishing in 2011. More than 402,000 Rhode Islanders participated in wildlife recreation activities in 2011.

Contrary to what my Republican colleagues claim, this rule is good economic news in Rhode Island and probably across the Country. That is way the American Sustainable Business Council, which represents 200,000 businesses that rely on clean water, supports the EPA clean water rule.

Polling commissioned by the Council found that 89 percent of small business owners, including 78 percent of Republicans, favor Federal rules like those proposed by the EPA to protect upstream headwaters.

Seventy-one percent of small business owners agree that clean water is necessary for jobs and the economy. Sixty-seven percent are concerned that water pollution could hurt their business in the future.

I ask unanimous consent that the letter from the Council opposing S. 1140 be entered in the record.

Senator SULLIVAN. Without objection.

[The referenced information follows:]

AMERICAN
SUSTAINABLE
BUSINESS
COUNCIL

Dear Senator,

On behalf of the 200,000 businesses we represent, the American Sustainable Business Council (ASBC) respectfully urges the Senate Subcommittee on Fisheries, Water and Wildlife to reject S.1140, the Federal Water Quality Protection Act. American businesses across many sectors of the economy rely on clean water, both for inputs into their products and to ensure the health and well-being of their employees.

S.1140 ignores the fact that the Environmental Protection Agency (EPA) has already conducted a thorough and open process over the past year that has allowed all affected parties to express their views on the proposed Waters of the US (WOTUS) rule. The rule was originally proposed by the EPA in light of longstanding confusion surrounding their jurisdiction under the Clean Water Act. We believe that S.1140 will subvert the standard rulemaking process by blocking issuance of the WOTUS rules before the public's views have been considered. Doing so would be a disservice to every business and industry that has already weighed in on these complex and important regulations.

National, scientific polling of independent small businesses commissioned by ASBC last year demonstrates how important clean water is to business owners. Eighty percent of small business owners, including 78% of Republicans and 73% of independents, favor federal rules like those proposed by the EPA to protect upstream headwaters. The polling also found:

- 71% of small business owners agree that clean water is necessary for jobs and the economy.
- 67% are concerned that water pollution could hurt their business in the future.
- 62% agree that government regulation is needed to prevent water pollution.
- 61% believe that government safeguards for water are good for businesses.
- 60% believe that complying with clean water regulations is more economical than risking harm from neglecting safety practices.

During 2014, EPA accepted comments on the proposed rule for many months, twice extending the comment period to accommodate higher interest from business environmental and agricultural groups. EPA should be given the opportunity to incorporate the public's views, and finalize the rule in a way that clarifies what needs to be.

We ask you to oppose S.1140 as it would render the voices of the public, including business owners, moot. It would leave American waterways unprotected, putting businesses and economies in peril. And it would represent a failure of long-term economic planning. We urge you to do the right thing for American businesses and the economy, and vote down S.1140.

Sincerely,

Richard Eidlin
Vice President of Policy and Campaigns
American Sustainable Business Council

TEL: 202.595.9302
1401 NEW YORK AVE. NW
SUITE 1225
WASHINGTON DC 20005

ASBCOUNCIL.ORG

Senator WHITEHOUSE. It isn't just the business industry that is ready for the waters of the United States rule, I would also like to submit for the record letters signed by the American Fisheries Society, the American Fly Fishing Trade Association, Backcountry Hunters and Anglers, Berkley Conservation Institute, Bull Moose Sportsmen's Alliance, Dallas Safari Club, Isaak Walton League of America, the National Wildlife Federation, Theodore Roosevelt Conservation Partnership and Trout Unlimited opposing this bill and further delay.

Senator SULLIVAN. Without objection.

[The referenced information follows:]

AMERICAN FISHERIES SOCIETY · AMERICAN FLY FISHING TRADE ASSOCIATION · BACKCOUNTRY HUNTERS AND ANGLERS · BERKLEY CONSERVATION INSTITUTE · BULL MOOSE SPORTSMEN'S ALLIANCE · DALLAS SAFARI CLUB · IZAAK WALTON LEAGUE OF AMERICA · NATIONAL WILDLIFE FEDERATION · THEODORE ROOSEVELT CONSERVATION PARTNERSHIP · TROUT UNLIMITED

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: Hunters and Anglers Strongly Oppose S.1140, Legislation Blocking the Clean Water Rule

Chairman Sullivan and Ranking Member Whitehouse:

The undersigned sportsmen organizations strongly oppose S.1140, the "Federal Water Quality Protection Act." S.1140 would derail a near-final rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat that supports a robust outdoor recreation economy.

The Environmental Protection Agency and the Army Corps of Engineers (the agencies) are very close to completing the clean water rule, which takes a huge step forward in clarifying protections for many streams and wetlands that have been at increased risk of pollution or destruction over the last decade. These at-risk streams and wetlands are home to countless fish and wildlife species, and America's hunters and anglers rely on them for access to quality days in the field. In addition, the clean water rule is informed by a thorough and extensive review of the peer-reviewed literature of wetlands and hydrologic sciences demonstrating the important chemical, physical, and biological connections between water bodies.

We have three primary objections to S.1140. First, S.1140 will lock in the current state of jurisdictional confusion, meaning that valuable fish and waterfowl habitat will remain at risk indefinitely. The bill prohibits the agencies from clarifying the Clean Water Act until they have met several specified criteria, which, despite a December 31, 2016, target date the agencies "should use best efforts" to meet, they may not be able to do for the foreseeable future. After nearly 15 years of Clean Water Act confusion, such an extended delay is unacceptable to the millions of hunters and anglers eager to have their local waters fully protected again.

Second, S.1140's consultation requirements are unnecessary and duplicative. The agencies engaged in a very transparent and thorough multi-year rulemaking process that included over 400 stakeholder meetings and an extended public comment period that produced over one million comments. The bill requires the agencies to halt the current rulemaking just weeks before it is complete, solicit input from stakeholders they have already consulted, consider factors they have already considered, and then propose the rule anew. In reality, the legal issues surrounding Clean Water Act jurisdiction have been hashed out, the science has been analyzed, peer-reviewed, and compiled, and the public and key stakeholders have weighed in. Simply put, the agencies have all the information they need to make an informed decision. There is nothing to gain by further delaying this rule.

Third, S.1140 would eliminate federal protections for waters long covered by the Clean Water Act. The bill makes it more difficult to protect smaller headwater streams, disregards wildlife connections in jurisdictional determinations, and eliminates protections for "isolated" waters. Many of these types of waters are prime hunting and fishing grounds, and in the case of what the bill calls "isolated" waters, are also the primary breeding grounds for the vast majority of waterfowl in North America.

We commend the agencies for advancing this long overdue rulemaking. This rule represents the best chance in a generation to clarify Clean Water Act protections while preserving – and, in some cases, enhancing – longstanding Clean Water Act exemptions for farmers, ranchers and foresters that encourage wise stewardship of land and water resources.

After an exhaustive rulemaking process, we are just weeks away from a final rule that will contain changes responding to the constructive criticisms offered during the comment period, resulting in a clearer, stronger final product. All stakeholders, including the nearly 900,000 members of the public who commented in support of clarified protections, should be given the opportunity to review the final rule. Rather than pursue legislation that will derail the rulemaking and lock in Clean Water Act confusion indefinitely, we urge you instead to reserve judgment and review the final rule when it is completed in the coming weeks.

The Clean Water Act has always been about restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. It is bedrock support for America's more than 40 million hunters and anglers, and for the 117 million Americans whose drinking water depends on healthy headwater streams. Protect America's clean waters. Oppose S.1140 and allow the open, transparent, and thorough rulemaking process to conclude at long last.

Thank you for considering our views.

Sincerely,

American Fisheries Society
American Fly Fishing Trade Association
Backcountry Hunters and Anglers
Berkley Conservation Institute
Bull Moose Sportsmen's Alliance
Dallas Safari Club
Izaak Walton League of America
National Wildlife Federation
Theodore Roosevelt Conservation Partnership
Trout Unlimited

Senator WHITEHOUSE. I also ask unanimous consent to submit for the record letters opposing S. 1140 from the Washington Department of Ecology, the National Wildlife Federation, a joint letter from American Rivers, BlueGreen Alliance, Clean Water Action, Earthjustice, Environment America, League of Conservation Voters, Natural Resources Defense Council, Prairie Rivers Network, Sierra Club and the Southern Environmental Law Center, a letter from Stroud Water Research Center and a joint letter from 10 scientists and a joint letter from 23 law professors.

Senator SULLIVAN. Without objection.

[The referenced information follows:]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

May 18, 2015

The Honorable Dan Sullivan, Chairman
U.S. Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife

The Honorable Sheldon Whitehouse, Ranking Member
U.S. Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife

Re: Hearing on S. 1140 in the United States Senate Committee on Environmental and Public Works, Subcommittee on Fisheries, Waters and Wildlife.

Dear Senator Sullivan, Senator Whitehouse, and members of the Subcommittee:

I am writing in opposition to S. 1140, that would halt the rulemaking process currently underway to define "Waters of the United States" for purposes of regulation under the federal Clean Water Act.

There is not another state in the U.S. that appreciates, and relies on, clean water as much as Washington State. Our residents harvest salmon on the Olympic Peninsula and Puget Sound, and our farmers grow apples along the Wenatchee River and hops in the Yakima River basin. Much of our drinking water supplies begin in the intermittent and ephemeral streams that are one of the major focal points of the rulemaking.

The Washington State Department of Ecology (Ecology) is quite experienced in matters associated with U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) "Waters of the U.S." jurisdiction. As the water quality authority for Washington State, Ecology implements the state's Water Pollution Control Act (RCW 90.48), and as the state water pollution control agency, is responsible for implementing all federal water pollution control laws and regulations, including 401 water quality certifications on Clean Water Act section 404 permits. As a practical matter, the types of waters that the proposed rule identifies as "Waters of the U.S." are consistent with the jurisdictional calls that we have seen in practice by the Corps in Washington State. Consequently, we do not believe that the rule will result in a major change for permittees in Washington State.

Ecology was one of four Washington State agencies that signed a consensus comment letter on November 12, 2014, expressing support for the Corps and EPA to clarify the definition of "Waters of the U.S." (enclosure). The other signatory agencies were the Washington Departments of Transportation, Fish and Wildlife, and Agriculture.

Ecology appreciates the Corps' and EPA's attempt to clarify jurisdiction for "Waters of the U.S." through the proposed rule. As the federal agencies worked through the public comment process last summer and fall, we have been appreciative of the interactions between EPA and the states. We are hopeful that the final rule will reduce confusion and improve predictability of water management processes in Washington State. Improved clarity will not only benefit the water resources of our state, but will also benefit the regulatory and business community, allowing for more efficient review and approval of future development.

In summary, Ecology supports the proposed "Waters of the U.S." rule because:

- Work thus far between federal agencies and the states has been positive and responsive. While additional work remains, we would like to build upon the interagency cooperation.
- The proposed rule will clarify that an important number of streams and wetlands be covered under the federal Clean Water Act.
- The increased clarity sought in the rule will help create a more predictable and efficient permitting system.

Finally, Ecology views S. 1140 as unnecessary. S. 1140 would halt a process that is nearing completion and send the agencies back to the starting line to begin the process again. Such an approach would undermine years of investment by agencies, states and thousands of interested stakeholders – including the state of Washington – all the while leaving in place an existing rule that is plagued by confusion and uncertainty. S. 1140 appears to create more confusion than it resolves, and would leave the water resources of our state more vulnerable and our regulatory process more complex. We urge the Subcommittee to reject this legislative proposal and allow the agencies to complete the current rulemaking process.

If the Subcommittee has further questions regarding Washington's position, please contact Lauren Driscoll at (360) 407-7045 or Lauren.driscoll@ecy.wa.gov.

Sincerely,

Maia D. Bellon
Director

Enclosure

STATE OF WASHINGTON

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy:

Washington State agencies submit the following comments on the proposed rule from the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), *Definition of Waters of the United States under the Clean Water Act*, EPA Docket ID No. EPA-HQ-OW-2011-0880. This letter represents the consensus comments of the state departments of Ecology, Transportation, Fish and Wildlife, and Agriculture on the proposed rule. We appreciate the Corps' and EPA's attempt to clarify the definition of "waters of the US."

Final implementation of the rule will affect each of these state agencies. The Washington State Department Ecology (Ecology) is the water quality authority for Washington State. Ecology implements the state's water pollution control act (RCW 90.48) and is delegated by EPA as the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations. Ecology issues Section 401 water quality certifications on federal Section 404 permits. Ecology has enjoyed a cooperative working relationship with our federal partners and looks forward to supporting the implementation of the rule.

Jurisdiction is clarified

Washington appreciates the clarity the rule provides regarding the scope of federal jurisdiction over waters of the United States in the context of U.S. Supreme Court decisions including *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*[1], and *Rapanos v. United States*[2]. These two decisions addressed the extent of federal jurisdiction but did not provide a clear and comprehensive definition of jurisdiction. The plurality decision in *Rapanos*

[1] 531 U.S. 159 (2001)
[2] 547 U.S. 715 (2006)

in particular has resulted in uncertainty regarding the correct scope of federal jurisdiction, especially for wetlands.

The proposed rule provides more clarity on which waters are per se jurisdictional. It also provides some guidance on assessing a "significant nexus" when determining the jurisdictional status of other waters. The rule provides clarity for some waters such as tributaries, but it contains language that is in need of further clarification. "Floodplain," "riparian" and "contributing flow" are all terms whose definitions should be articulated more clearly on a regional basis, since their defining characteristics may vary in different parts of the country.

Additionally, the proposed rule applies to Section 404 permitting as well as other permitting programs such as Section 402. The rule should explain how these two programs compare and overlap. For example, the relationship between the rule and management of municipal separate storm sewer systems needs to be explicit.

Rule is Consistent with Existing Practices

Washington supports the inclusion of the types of "waters of the US" outlined in the proposed rule. These waters are consistent with the jurisdictional determinations that we have seen in Washington. In Washington State, both the Corps and Ecology consider the following waters jurisdictional:

- Perennial, intermittent and ephemeral streams (tributaries)
- Channelized streams in ditches (tributaries)
- Wetlands linked to a navigable water through shallow subsurface flows such as hyporheic flows (in the floodplain)
- Ditches excavated through wetlands or other "waters of the US" (tributary)

No Change for State Waters

Washington interprets the draft rule to not affect the way the state regulates its waters. Washington's definition of "waters of the state" in the state water pollution control act (RCW 90.48) protects additional waters not covered under the federal Clean Water Act such as prior converted croplands and isolated wetlands. Washington will continue to regulate all waters of the state regardless of federal jurisdiction. However, Washington appreciates that the rule more clearly identifies what types of waters would be considered jurisdictional under the federal Clean Water Act. This is important when proponents may need Section 404 permits from the Corps and related Section 401 certifications from the state.

These clarifications regarding "waters of the US" should help streamline permitting since those waters identified in the rule would not require individual jurisdictional determinations. While Washington protects its waters under state law, this uncertainty in federal jurisdiction has resulted in permitting delays when a jurisdictional determination is required. Although this

proposed rule may help streamline determination for some waters, such as tributaries, it may take longer to receive a jurisdictional call when using the significant nexus test since these will require case-by-case determinations.

Significant Nexus

Washington requests that the rule, preamble or guidance should be amended to provide more specificity on what is needed to document a significant nexus. Washington supports the use of remote sensing to identify similarly situated classes of waters when making significant nexus determinations as well as the use of single point of entry watersheds and ecoregions to identify "in the region" where waters are "similarly-situated." Using the watershed and ecoregion in significant nexus determinations will allow states and the Corps and EPA to accommodate the variety of landforms and systems across the country.

Given the broad nature of the rule and the diversity of waters across the United States, Washington recommends that the Corps and EPA work regionally with the states in identifying classes of "other waters" that have a significant effect on downstream waters. Identifying classes that have a significant nexus with downstream waters would reduce the number of individual determinations needed. As part of this work, Washington recommends that the Corps and EPA work with the state to identify appropriate regions in our state that may contain classes of similarly situated waters that provide a significant nexus to a "water of the US."

Permit streamlining could result from identifying classes of "other waters" as jurisdictional by reducing the number of individual significant nexus determinations necessary and; reducing the time needed to process permits. When an individual determination is necessary, we recommend that the Corps strive to meet a 180-day timeframe for a decision. A timeframe for individual determinations will provide a clear standard for regulatory staff and will help reassure applicants and the public that projects will be processed in a timely manner.

Support of Tributary Definition

Washington supports the inclusion of the presence of a bed and bank and evidence of flow in the definition of tributary. Regional manuals on determining the Ordinary High Water Mark on tributaries will be important to ensure clarity. We recommend that the Corps and EPA work with states to develop regionally appropriate methods and tools for delineating tributaries. In response to EPA's request, we feel it is appropriate to include wetlands as tributaries rather than just as adjacent waters when they are part of a tributary system.

The change from "adjacent wetlands" to "adjacent waters" to include other water features (such as oxbow lakes) is appropriate when they are adjacent to jurisdictional waters, bordering, contiguous or located in the riparian area or floodplain of a "water of the US."

Clarification on Floodplains, Riparian Areas, and Contributing Flow

Washington supports the inclusion of waters located in the floodplain of jurisdictional waters or in riparian areas along waters and tributaries as "neighboring" waters because of their importance in protecting the physical, chemical and biological integrity of the nation's waters.

Regulatory protection of these critical waters is important in our state. Washington has several federally listed salmonid species. Loss of in-water, floodplain and riparian habitats has been a key contributor to their decline. Washington floodplains support many wetlands that are used by salmonids for refuge and rearing. These wetlands are often connected to rivers via shallow subsurface hyporheic flows and overbank flooding. Wetlands in riparian areas provide critical functions such as nutrient cycling, flow attenuation, and habitat for invertebrates, amphibians, and fish. Wetlands in these areas directly affect the physical, chemical, and biological integrity of "waters of the US." Therefore, Washington agrees that wetlands located in floodplains and riparian areas are appropriately included as "waters of the US."

Washington also concluded that regional specificity is needed to refine these definitions. For example, we believe that a spatial extent is needed on a regional basis for determining which riparian and floodplain wetlands are de facto jurisdictional. These definitions and delineation guidance should be developed cooperatively with the state. It should also be noted that the ecological value of these resources in riparian and floodplains notwithstanding, federal jurisdiction in these waters may result in additional cost to applicants, federal and state permitting agencies, and for actions requiring federal Endangered Species Act consultation when federal permitting is needed. The Corps and EPA should consider potential added costs as the rule is finalized.

"Contributing flow" should be defined based on stream size and significance of the contribution. While the feasibility of doing this on a national basis may not be practical given the diversity of climatic conditions, ecoregions, and landforms among the states; regional guidance could be developed to determine what constitutes a significant contribution for different stream types.

Therefore, Washington recommends that Corps and EPA work with the State and tribes to develop regionally appropriate definitions of "floodplains," "riparian areas," and "contributing flow." In addition, methods for determining their physical extent are needed so that the state and federal agencies have a common understanding of how these terms apply in Washington.

Drainage and irrigation ditches in agricultural areas

Washington supports the existing Section 404 permitting exemptions for normal and ongoing farming, silviculture, and ranching activities as described in 33 CFR § 323.4(a)(1):

> *(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and*

forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in §323.4(a)(1)(iii).

In cases where farm ditches contain channelized streams, they should, under the proposed rule, be considered jurisdictional even if they only contain intermittent flow. However, under the existing exemption for ongoing agriculture, maintaining them in the course of normal farming, silviculture, and ranching continues to be exempt from Section 404. Under Washington State law, established and ongoing agricultural operations and activities such as ditch maintenance may continue without the need for a wetland authorization. As long as producers are using best management practices approved by Ecology, their ongoing farming activities are considered to be protective of water quality. However, new ditches and new or expanded drain tile systems draining a "water of the US" to convert it to a new use would require a Section 404 permit.

In Western Washington, farmers often construct shallow ditches (≤ 18") on actively farmed fields in the spring. The purpose is to drain surface water from their fields to allow planting. Washington is looking for clarification and affirmation by EPA that shallow, temporary ditches dug specifically for the purpose of draining surface waters from previously converted farmland within floodplains and adjacent to tributaries are not jurisdictional under the new definition.

Clarification Needed for Non-Agricultural Ditches

State agencies and local governments have expressed concern that the wording in the "water of the US" definition for excluding ditches from Section 328.3 (§ 328.3(b)(3) and (4)) is somewhat ambiguous. The exclusion should clearly identify that sections of roadside ditches and other drainage ditches excavated in uplands that drain only upland areas, are not jurisdictional upstream of the discharge point even if the ditch periodically "contributes flow" to a "water of the US." Clarifying these distinctions would eliminate much of the confusion.

Roadside or other drainage ditches containing a perennial and intermittent channelized stream would be jurisdictional if it meets the definition of a tributary, as proposed in the rule. The rule should be amended to specifically clarify that ditches that contain tributaries are jurisdictional, and are not excluded simply because they flow through a ditch.

Stormwater systems

It is not clear how Section 402 permitted facilities will be treated under the proposed rule. The proposed language could be interpreted to mean that any ditch system that discharges to a "water of the US" would be jurisdictional. Many roadside ditches and municipal separate storm sewer systems (MS4s) discharge to jurisdictional wetlands and streams. These systems are permitted and regulated under Section 402 and require periodic maintenance. Where they do not contain

streams, they should be able to be maintained without the need for permitting. Washington recommends that ditches in uplands and draining only uplands as part of an MS4 management system should be non-jurisdictional upstream of the discharge point to a wetland or tributary.

The proposed rule should also clarify that those constructed parts of stormwater management systems that often look and act like natural systems (for example, treatment swales and ponds, infiltration ponds, treatment wetlands, rain gardens, and compost filters) are exempt similar to the wastewater treatment exemption. Some of these treatment systems, permitted pursuant to Section 402, meet wetland criteria, especially if they were thoughtfully designed and implemented. However, when they are specifically constructed for stormwater conveyance and treatment those features should be excluded from the definition of "waters of the US". This clarification could be in the preamble or regulatory guidance letters for implementing the rule.

Regional Manuals

As previously noted, Washington strongly recommends that EPA, and the Corps work with their state partners to develop regional manuals, definitions, and guidance to implement the rule. We recognize the difficulty in providing clear definitions and standards nationwide due to the diversity of climate, landforms and ecosystems across the country. Because of this diversity, the rule is understandably vague which makes it imperative that the agencies develop regional definitions and guidance. With the states as co-regulators, the agencies should work directly with the states as they develop implementation guidance in their region.

Connectivity report

We recommend that the agencies wait to finalize and adopt the "waters of the US" rule until after the science advisory board review is completed and the report is finalized. Washington believes that the timing of the final report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it interacts with the proposed "waters of the US" rule process is important. Since the connectivity study will be used to provide the scientific basis for the determination of jurisdiction under the rule, it seems appropriate that the agencies wait to finalize the rule until after the Scientific Advisory Board has completed their review and the report is finalized. To adopt the rule prior to the final report being released would miss an opportunity to refine the rule based on the scientific findings of the final connectivity report.

Summary

Washington appreciates the opportunity to comment on the proposed rule, and hopes that our comments are helpful. Washington recognizes the challenges inherent in defining the extent of jurisdiction under the Clean Water Act. We commend EPA and the Corps for the thought and hard work that went into the development of the proposed rule. We appreciate EPA's outreach to the states and the number of calls with states that have been available where EPA has explained some of the rationale behind the rule language. The calls have been very helpful. In

closing, Washington would like to emphasize a repeated theme: the importance of EPA and the Corps working with states on a regional basis to develop guidance on the implementation of the rule.

Sincerely,

Maia D. Bellon, Director
Washington State Department of Ecology

Philip Anderson, Director
Washington State Department of Fish & Wildlife

Lynn A. Peterson, Secretary
Washington State Department of Transportation

Don R. "Bud" Hover, Director
Washington State Department of Agriculture

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: National Wildlife Federation Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The National Wildlife Federation (NWF) submits this statement for the hearing record in strong opposition to S. 1140 and in strong support of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule defining "Waters of the United States" under the Clean Water Act. We also attach and incorporate by reference our February 4, 2015 hearing comments in support of the Clean Water Rule.

NWF represents over 4 million conservation-minded hunters, anglers, and outdoor enthusiasts nationwide. Conserving our Nation's wetlands, streams, and rivers is at the core of our mission. We have been active in advocating for Clean Water Act protections since the Act was passed in 1972. **For the reasons summarized below, we strongly oppose S. 1140 and any other legislative effort to delay or derail this much-needed Clean Water Rule.**

S.1140, misleadingly titled the "Federal Water Quality Protection Act," would derail a near-final rulemaking process to clarify the Clean Water Act. This rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

The Clean Water Act has been successful at improving water quality and stemming the tide of wetlands loss in every state. However, Clean Water Act safeguards for streams, lakes and

wetlands have been eroding for over a decade following two controversial Supreme Court decisions which cast doubt on more than 30 years of effective Clean Water Act implementation. For more than a decade now, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution and destruction. Wetlands are at risk as well. In fact, the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration.

When wetlands are drained and filled and streams are polluted, we lose the ability to pursue our outdoor passions and pass these treasured traditions on to our children. Moreover, pollution and destruction of headwater streams and wetlands threaten America's hunting and fishing economy – which accounts for over $200 billion in economic activity each year and 1.5 million jobs, supporting rural communities in particular.

The EPA and the Corps are on the verge of completing the clean water rule, which takes a huge step forward in clarifying protections for many streams and wetlands that have been at increased risk of pollution or destruction over the last decade. The agencies have engaged in a transparent and rigorous multi-year process that included an extensive peer-reviewed scientific analysis, a thorough legal analysis, over 400 stakeholder meetings, a 200+ day public comment period, and over 1 million public comments, 87% of which support these protections.

NWF strongly opposes S. 1140 for following key reasons:

S. 1140 is a waste of taxpayer money. S. 1140 requires the agencies to stop the current rulemaking, solicit input from stakeholders they have already consulted, consider factors they have already considered, and then propose the rule anew. It forces the agencies to do a new rulemaking and it imposes new layers of wasteful process not required by any federal law.

S. 1140 would lock in the current state of confusion around Clean Water Act jurisdiction and leave our nation's waterways, and the fish and wildlife that depend on them, at risk for pollution and destruction.

S. 1140 rejects key tenets of connectivity science, undermining our ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays.

- **Many streams would be harder to protect.** The bill erects an enormous hurdle to including many smaller streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway.

- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways.

- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of

wetlands that are "next to" other protected waterways. The effect of these exemptions would be to allow dumping of wastes into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution.

- The bill appears to exclude certain long-protected water bodies by narrowly defining "body of water" to ignore many man-made tributaries, even where they essentially function as natural streams, and even though such waters have significant impacts on downstream waters. Man-made tributaries have historically been covered by the Clean Water Act.

- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any "organism,"** despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds.

- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding.**

- **The bill also rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

S. 1140 includes vague, confusing, and harmful new exemptions for certain stormwater and floodwater facilities, "any water that is no longer a water of the United States" because of an action taken under a permit to discharge dredged or fill material, and, it seems, for rain-dependent streams, even ones that meet the bill's new, un-protective standards.

NWF strongly objects to the premise that states can fully protect their waters without a uniform Clean Water Act foundation. More than 30 states joined a Supreme Court brief in *Rapanos* arguing that small streams and nearby wetlands deserved federal protection. They explained that:

- **"...each of the lower 48 States has water bodies that are downstream of one or more other States;"**

- **"...maintaining consistency among water pollution programs throughout the nation is essential. The Clean Water Act is key to achieving this relative parity, because it creates a federal 'floor' for water pollution control...."; and**

- **"... the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly."**

The Clean Water Rule also provides a safety net when states have legal limitations on adopting safeguards that go beyond the federal minimum. Over two-thirds of U.S. states have laws that could restrict the authority of state agencies or localities to regulate waters left

unprotected by the federal Clean Water Act.

National Wildlife Federation strongly supports this historic "waters of the United States" rulemaking as necessary and the best chance in a generation to clarify which waters are – and are not – "waters of the United States" protected by the 1972 Clean Water Act. We strongly oppose S. 1140 and its attempt to derail the Clean Water Rule and undermine the very foundations of the 1972 Clean Water Act. We urge Congress to respect the agencies rulemaking and allow them to finalize this much-needed rule without further delay. We look forward to a final rule soon that will provide greater long-term certainty for landowners and advance our collective efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Respectfully Submitted,

Jan Goldman-Carter
Senior Manager, Wetlands and Water Resources
National Wildlife Federation
1990 K St. NW Suite 430
Washington, DC 20006

American Rivers · BlueGreen Alliance · Clean Water Action · Earthjustice · Environment America· League of Conservation Voters · Natural Resources Defense Council · Prairie Rivers Network · Sierra Club · Southern Environmental Law Center

May 15, 2015

Dear Senator:

The undersigned organizations, and our millions of members and supporters, oppose S. 1140, the so-called "Federal Water Quality Protection Act," which will be the subject of a hearing in the Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife, on May 19, 2015.

Contrary to its title, this legislation attacks clean water protections. In fact, this legislation would halt an ongoing rulemaking to clarify and restore Clean Water Act protections for countless water bodies, including streams that contribute to the drinking water of one in three Americans. The Army Corps of Engineers and the Environmental Protection Agency are close to completing their Clean Water Rule, but S. 1140 would stop this important, scientifically rigorous rule before the public has even had the chance to see the finished product.

The agencies undertook a very transparent and thorough process in developing the Clean Water Rule, holding more than 400 stakeholder meetings and providing more than 200 days for public comment on the proposal, and conducting a detailed and open analysis and peer review of the science on which the rule is based. All stakeholders, including the over 800,000 members of the public who commented in support of these protections, should be given the opportunity to review the final rule.

This troubling legislation blows up the current rulemaking and forces the agencies to go back and solicit input from stakeholders they have already consulted, consider factors they have already considered, and then propose a rule (as they have already done). The Clean Water Rule has essentially been in the making for more than a decade and stakeholders from all sides of the issue have asked for a rule to provide certainty and reliability in the permitting process for waters covered by the Clean Water Act. There is nothing to gain by forcing the agencies to repeat years of analysis and consultation concerning this rule. Rather, this bill is simply a last-minute and thinly-veiled attempt at blocking these crucial protections and leaving our nation's waterways at continued risk of pollution and destruction.

This legislation would not only halt the current rulemaking process, but also would create new impediments to protecting important waters and creates far more confusion than it resolves. The legislation would make it harder to protect streams and wetlands and would outright direct the agencies to exclude so-called "isolated waters" from being covered by the Clean Water Act. All of these new limitations on the Act's coverage ignore the copious scientific evidence revealing the important role of headwaters and seasonal and rain-dependent waters on downstream water

quality. The bill also includes new vague provisions that would add to the confusion, rather than clarify which waters are protected.

This legislation is also a waste of taxpayer money. It requires the agencies to jump through numerous procedural hoops as a new rule is created – to no evident purpose. The legislation also directs the agencies to map all protected waters in the country, even though most water bodies never need a determination of their status under the law; that typically becomes necessary only when a discharger seeks to release pollutants into water bodies.

Finally, the legislation lays out a timeframe that is all but certain not to be met, thereby setting the agencies up to fail.

For all of these reasons, we oppose this legislation.

Sincerely,

American Rivers
BlueGreen Alliance
Clean Water Action
Earthjustice
Environment America
League of Conservation Voters
Natural Resources Defense Council
Prairie Rivers Network
Sierra Club
Southern Environmental Law Center

STROUD
WATER RESEARCH CENTER

May 18, 2015

The Honorable Dan Sullivan, Chairman
Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse, Ranking Member
Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife
U.S. Senate
Washington, D.C. 20510

Dear Chairman Sullivan and Ranking Member Whitehouse,

On behalf of myself and my colleagues at Stroud Water Research Center I wish to signify strong opposition to S. 1140, deceptively titled the "Federal Water Quality Protection Act," which would derail the EPA's much-needed clarification of "waters of the United States" under the Clean Water Act.

Our chief concern is that the bill completely ignores the rigorous science on which the EPA's ruling is based and would prevent the agency from protecting many of the small, intermittent, rain-dependent streams, tributaries and other waters that are so crucial for water quality.

The EPA's proposed clarification is informed by decades of scientific research about freshwater ecosystems, such as the work our scientists have been doing since 1967. The River Continuum Concept, published in 1980 by a team of scientists led by Stroud Water Research Center, is a foundational concept in freshwater ecology. It states that a river system represents a physical, chemical, and biological continuum from the smallest headwater streams to the main stem river at its confluence with the estuary. Subsequent research around the world has not only supported this concept but demonstrated that, in fact, small headwater streams are the most critical and most vulnerable parts of a river.

Our scientists were among the many who participated in the scientific advisory panel that helped the EPA's Office of Research and Development conduct a comprehensive review of **more than 1,200 peer-reviewed publications** in the scientific literature. This report (U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Washington, DC: U.S. Environmental Protection Agency, 2015) states:

> "The scientific literature clearly demonstrates that streams, regardless of their size or how frequently they flow, are connected to downstream waters in ways that strongly influence their function....The incremental contributions of individual streams and wetlands are cumulative across entire watersheds."

You should know that more than 85 percent of the nation's stream miles are small enough to jump across and many—if not most—of these flow through private property, many intermittently. So, while opponents may object to the EPA having jurisdiction over streams on private land, landowners should never have the right to pollute streams running through their property, regardless of how small or how often they flow.

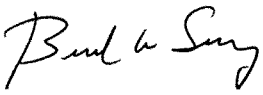
The science tells us that watersheds with protected wetlands, streamside forest buffers and other best management practices can support both humans and wildlife in a sustainable way. They trap and store sediments; filter out contaminants; reduce the frequency and severity of flooding by slowing the release of storm water; mitigate thermal pollution caused by deforestation, industrial inputs and water diversions; and replenish underground aquifers.

970 Spencer Road, Avondale, PA 19311-9514, USA (610) 268-2153 Telephone (610) 268-0490 Fax www.stroudcenter.org

For decades, science has demonstrated the necessity of a holistic approach to understanding, protecting and restoring freshwater ecosystems. This requires a nationwide effort. Water, like air, transcends state, legislative and private property boundaries. Whatever happens upstream affects us all.

Fresh water is our most precious natural resource, as essential to life as the air we breathe. To effectively protect our freshwater ecosystems, the Clean Water Act as well as the EPA's authority to upgrade and enforce it should be strengthened, not undermined. Science, not politics or moneyed interests, should guide the EPA's rulemaking on the Clean Water Act.

Sincerely,



Bernard W. Sweeney, Ph.D. director and president
Stroud Water Research Center

Stroud Water Research Center, based in Avondale, Pennsylvania, is focused on freshwater research, environmental public education and watershed restoration. The independent nonprofit organization helps businesses, landowners, policymakers, and individuals make informed decisions that affect water quality and availability around the world. For more information, please visit www.stroudcenter.org

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The undersigned scientists strongly oppose S.1140, misleadingly titled the "Federal Water Quality Protection Act." S.1140 would derail a near-final rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

Of central concern to us as scientists is that the bill disregards the rigorous science on which the Clean Water Rule is based, hamstringing the agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to water quality.

As scientists who have spent careers studying streams and wetlands, we are aware of the need to restore protections for these aquatic ecosystems under the Clean Water Act. For years now we have urged the Administration to address this issue through a rulemaking to clarify which waters are protected. To inform this critically important rulemaking, we have joined many of our colleagues in contributing to the Environmental Protection Agency's ambitious connectivity science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2014). We have contributed to the underlying peer-reviewed scientific studies, informal reviews of the draft Connectivity Report, and the formal Science Advisory Board peer review of the Connectivity Report. The undersigned are professional scientists with broad knowledge and expertise in stream and wetland ecosystems, including their physical structure, chemistry, and biology. The scientists who have signed this letter include leading researchers on the ecology, water quality, and biota of rivers, streams, and wetlands.

Now, just as the agencies are on the verge of finalizing this important science-based rulemaking, S. 1140 would not only derail this rulemaking, but seeks to prohibit any future rulemaking that does not meet its "principles;" "principles" that disregard the connectivity science – as well as

the goals, framework, and legislative intent of the 1972 Clean Water Act. S. 1140 hamstrings the agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to "maintaining and restoring the physical, chemical, and biological integrity of the nation's waters."

Wetland and stream science has consistently demonstrated the importance of small streams and wetlands for flood control, groundwater recharge, reducing concentrations of pollutants in drinking water sources, reducing erosion, and providing essential habitat for plant and animal species, all of which provide significant public benefit.

Below, borrowing from our 2011 letter to the Council on Environmental Quality, and updated with quotes from the Science Advisory Board 2014 letter to the Environmental Protection Agency regarding the scientific basis of the proposed rule, we briefly outline basic principles and findings of connectivity science that are rejected by S. 1140, but must be reflected in the Clean Water Rule in order to meet the goals of the Clean Water Act:

1. Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. The small intermittent stream is not isolated from the mighty river. Longstanding and robust scientific research has demonstrated the longitudinal connectivity of river networks, i.e., that **ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.**

2. **A sizable fraction of channel length in a river network is in intermittent and headwater streams.** In arid states such as Arizona, Utah, and Colorado, from 71 to 96% of stream miles have been classified as ephemeral or intermittent. Intermittent streams are also significant in states that receive more rainfall. In Alabama, 80% of stream miles in the National Forests are considered intermittent because they go dry during late summer or autumn; intermittent streams in Michigan comprise 48% of the length of stream channels in the state. These examples illustrate the extent of intermittent streams in river networks throughout the Nation.

3. As the SAB concluded from the 2014 *Connectivity Report:*

   There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.

4. From a wetland perspective, the EPA and Army Corps of Engineers estimate that over 20 million acres of wetlands in the contiguous 48 states could be considered "geographically isolated." Despite often not having a connection to navigable waters that is direct or that

exists throughout the year, **the scientific literature demonstrates that these wetlands are nevertheless often interconnected with navigable waters and are often not ecologically and/or hydrologically isolated.**

5. As the SAB concluded from the 2014 *Connectivity Report:*

   The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because **adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters. Importantly, the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity.** Thus, the Board advises the EPA that adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.

6. The SAB also concluded:

   The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.

7. The SAB further concluded:

   There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas 18 coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States.

8. And furthermore:

   … [A]s the science continues to develop, other sets of wetlands may be identified as "similarly situated." The Board notes, however, that **the science does not support excluding groups of "other waters" (or subcategories of them, e.g., Great Plains playa lakes) that may influence the physical, chemical and biological integrity of downstream waters.**

9. The SAB also advised EPA:

   The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.

10. And that:

    ...[T]here is a lack of scientific knowledge to help discriminate between ditches that should be excluded or included. For example, many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the Cowardin classification system and may provide certain ecosystem services."

11. **Small streams and wetlands contribute to the physical integrity of navigable rivers.** They provide hydrologic retention capacity (i.e., the ability to hold and store water), and when they have been eliminated as a result of human activity, the frequency and intensity of flooding increases downstream, and base flows are lower. For example, studies have shown that the loss of two-thirds, or about 14 million acres, of prairie pothole wetlands (considered within the "geographically isolated wetland" designation) has contributed significantly to increases in the flooding and associated damages of the Red River and other navigable rivers of the region. Small streams and wetlands also improve water quality by storing eroded sediment, thereby reducing downstream sediment transport during storms, and are critically important in recharging groundwater and other sources of water for drinking, irrigation and industry.

12. **Small streams and wetlands also contribute to the chemical integrity of navigable rivers.** These are the channels of the drainage network in closest contact with the soil and are the sites of extensive chemical and biological activity that influences water quality downstream. Small streams and wetlands are the sites of active uptake, transformation, and retention of nutrients; their degradation results in increased downstream transport of nutrients, which can result in eutrophication (e.g., nuisance algal blooms) of downstream rivers, lakes, and estuaries. Nutrients and contaminants enter streams from non-point sources primarily during storms, and it is during storms when small streams and wetlands are most likely to contain water and provide nutrient removal services. Likewise, Delmarva bay wetlands provide similar water quality protection and improvement functions for water that flows through them in transit to the Chesapeake Bay. Likewise, playa lake wetlands of the southern Great Plains, a class of "geographically isolated wetland," collect and improve the quality of water that ultimately filters through them and recharges the Ogallala aquifer, which provides drinking and irrigation water for eight states.

13. **Small streams and wetlands contribute to the biological integrity of navigable rivers.** They supply food resources to riparian and downstream ecosystems. For example, invertebrate inhabitants of headwater streams are sources of food to fish, and emerging aerial adults of aquatic insects provide food for birds and bats. Small streams provide a thermal refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including many prized sport fishes. Small streams and wetlands also provide critical habitat for unique and threatened species of invertebrates, amphibians and fishes. For example, prairie potholes provide the breeding habitat that produces an estimated 50-70% of the total annual duck production in North America. Approximately one-half of the continent's bird species are wetland-dependent or associated, and most of these are migratory birds shared across international borders and by all states in each of the four flyways covering the U.S.

Small streams and wetlands are an integral part of the nation's network of waters, and provide numerous ecological goods and services of significant value to society. Although they may not have a permanent or direct hydrologic connection to a navigable river, they have a demonstrable functional connection with and a direct impact on the physical, chemical, and biotic integrity of navigable rivers.

On the basis of decades of scientific research, it is clear that small streams and wetlands are not isolated or unrelated to the ecological integrity of navigable waterways. If our nation hopes to achieve the goals of the Clean Water Act, small streams and wetlands must remain within its jurisdiction.

S. 1140 rejects these key scientific principles and findings, undermining our ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays.

- **Many streams would be harder to protect.** The bill would include streams identified in a USGS data set that, among other limitations, doesn't generally pick up streams that are less than a mile long. The bill erects an enormous hurdle to including additional streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway.

- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways.

- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of wetlands that are "next to" other protected waterways. The effect of these exemptions would be to allow dumping of wastes into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution.

- **The bill appears to exclude certain long-protected water bodies by narrowly defining "body of water" to ignore many man-made tributaries, even where they essentially function as natural streams, and even though such waters have significant impacts on downstream waters.**

- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any "organism,"** despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds.

- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding.**

- **The bill also rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

We are on the verge of securing a scientifically sound Clean Water Rule that will bolster the effectiveness of the Clean Water Act in maintaining and restoring our nation's waters. We urge Congress to support the agencies' final Clean Water Rule, respecting decades of robust scientific literature that demonstrate the critical role of aquatic systems and clarifying and restoring longstanding protections for these vital waters by clarifying their coverage under the Clean Water Act.

Respectfully Submitted,

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cc: Administrator McCarthy, Environmental Protection Agency
Asst. Secretary Darcy, United States Army Corp of Engineers
Secretary Vilsack, United States Department of Agriculture
Secretary Salazar, United States Department of Interior
Chair Christy Goldfuss, Council on Environmental Quality

May 18, 2015

United States Senate

Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Subject: Proposed S.1140, the "Federal Water Quality Protection Act"; pending rulemaking regarding "waters of the United States"

Dear Senators,

We the undersigned are professors of law who teach and write about environmental law. In particular, we have studied, taught, and also written or lectured about changes in the law regarding what are protected "waters of the United States."

We write to offer our critique of S.1140, entitled the "Federal Water Quality Protection Act," sponsored by Senator Barrasso and 27 other senators. This bill proposes to derail over a year of work on a regulation proposed on April 21, 2014 by the Army Corps of Engineers and the Environmental Protection Agency regarding the scope of protected "waters of the United States." That proposed regulation linked directly to an accompanying massive study of all peer reviewed science of functions of various sorts of waters and their "connectivity." (Hereinafter, we will refer to this as the "Connectivity Report.") Public comments were also sought and received regarding the Connectivity Report. The notice and comment phases for this "waters" rulemaking are over, involving over a million comments filed and hundreds of meetings about the proposed rule. Its issuance as a final rule is anticipated to occur this spring.

We believe that S.1140 is ill-advised procedurally, is problematic in its drafting choices and failure to mesh with peer reviewed science, would engender decades of litigation and regulatory uncertainty, and substantively would result in a major weakening of the current Clean Water Act. We instead ask Congress to let the current rulemaking finish with issuance of a final regulation. That final regulation may address concerns and objections, but if not then either Congress can act with reference to an actual final rule, those affected can pursue relief with the Corps and EPA, or those aggrieved can file a challenge in federal court.

I. *Derailing the "waters of the United States" rulemaking would be wasteful and deny all the benefit of the rulemaking process*

When the Environmental Protection Agency (EPA) and the Army Corps of Engineers started the rulemaking process for the pending "waters" rule last year, they were responding to calls for clarifying regulations from environmentalists, the private sector, and a majority of the Supreme Court. Protecting jurisdictional waters was an

area of bipartisan consensus for thirty years, right through the recent Bush Administration. A unanimous Court deferred to agency line-drawing in regulations about what sorts of waters deserved protection in *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). However, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) *(SWANCC)* and then *United States v. Rapanos,* 547 U.S.715 (2006) *(Rapanos)* unsettled that longstanding bipartisan consensus, breeding new legal uncertainty. *Rapanos* itself resulted in two different Court numerical majorities about what sorts of waters are federally protected. In addition, the opinion of Justice Anthony Kennedy articulated a "significant nexus" test for future jurisdictional determinations that, in the absence of clarifying rulemakings, also resulted in somewhat unpredictable jurisdictional calls. Under Supreme Court doctrine, the Kennedy opinion has been viewed as most authoritative in the absence of a single Court majority opinion; in addition, four justices agreed with protecting the sorts of waters protected by Justice Kennedy, creating a five justice majority. Since *Rapanos,* the EPA and Corps have acted under interpretive guidance documents and courts have clashed on what sorts of waters are protected. Clarifying legislation never emerged from congressional committees. And now bills in the House and the Senate in somewhat varying ways seek to preclude EPA and the Army Corps from finalizing their waters rulemaking.

S.1140 mandates extensive re-doing of the rulemaking process for a new "waters" rule, plus adds on top as a statutory requirement compliance with an array of executive orders. In addition, the bill contemplates 330 days of rulemaking process, including submission of a pre-proposal document that would summarize and provide responses arising out of the pending notice and comment process, but without allowing completion of that rulemaking unless it complies with S.1140's new procedural and substantive hurdles. Any new rule would also be required to go through a pre-proposal submission to House and Senate committees. This bill hence would impose for a future "waters" regulation an unusually lengthy and labyrinthine set of procedural requirements.

The waters rule has already gone through an extensive participatory process. Vast private and governmental resources have been expended on this proposed rule. The Senate's choices are simple. It can let the rulemaking finish, or it can seek to preclude its completion, or, as proposed in this new bill, it can both derail the pending rulemaking and make massive changes to the scope of the Clean Water Act. We ask the Senate to allow completion of the waters rule, then allow all affected interests to study the final actual choices. The Clean Water Act should not be weakened.

II. The proposed bill ignores science regarding waters and their functions

This proposed bill uses terms like "isolated" that have appeared in some court opinions interpreting the Clean Water Act, as well as terms like "natural" channel. These terms, however, do not describe recognizable scientific categories of waters

and fail to consider how many rivers and streams are channelized, especially as they move through urbanized environments or near infrastructure projects. Similarly, it refers in a few places to "statistically valid" methodology and streams, but then does not link that language to the vast array of waters and regions studied in the Connectivity Report. It also references a particular mapping approach that could undermine protection for waters due merely to their length, plus could be read to make almost all wetlands' protections subject to case-by-case analysis.

In fact, this bill nowhere even references the Connectivity Report. The Connectivity Report is a remarkable document, responding to decades of calls for regulation to be based on peer reviewed science. If there is to be a Senate bill or other new legislation, it should not ignore relevant peer reviewed science.

III. *The pending bill is laden with problematic drafting choices that would engender uncertainty*

This brief letter cannot fully critique this proposed 27 page bill, but here points out a handful of important but problematic drafting choices. Most significantly, much of this bill is written as though it is a policy critique and statement of policy preferences, yet if passed it would constitute the first substantive change to the scope of the Clean Water Act in years. Among its other drafting problems are the following:

--it repeatedly references Code of Federal Regulation sections, yet such regulations have spawned many related guidance documents, regulatory approaches, and judicial precedents. Is this bill meant to incorporate all of them? The proposed waters rule is meant to reduce current regulatory uncertainty; are references to current CFR provisions meant to freeze in place regulatory approaches, including those in a state of conflict?

--the Clean Water Act, like other federal environmental laws, has long called for federal leadership but also "saved" and encouraged state action either to help with implementation of federal law or in offering greater or additional protections. Abundant regulatory and case law has fleshed out what existing statutory language means. The new Senate bill, however, uses language that mainly adds emphasis regarding the importance of state roles. It even inverts the usual roles, referring to the "limits of federal jurisdiction" and the "primary" role of states. This language lacks any clear substance, but in raising questions about the clear supremacy of federal law would undoubtedly engender years of disagreement and litigation.

--the proposed bill defines critically important terms but with repeated use of the same term being defined (for example, "continuous" in Section 3(11)(C)).

--some of the drafting uses layers of interrelated language of prohibition, leaving ambiguity. (See, especially, the Section 4(b)(3) provisions about what "waters"

"should not include" and subpart 4(b)(3)(D) and its subparts about "a system" . . . "holding" various sorts of waters and then "not including instream reservoirs or other instream facilities.")

--Section 4(c) converts an array of executive orders into a statutory mandate, but then repeatedly mentions only "costs," whereas modern approaches to cost-benefit analysis usually call for assessment of costs and benefits, with a preference or mandate for maximizing net benefits and clarity about statutory requirements trumping executive orders. Section 4(c) should be deleted or amended to create clarity.

IV. S.1140 would result in a major weakening of the Clean Water Act

Most importantly, S.1140 would constitute a massive weakening of the Clean Water Act. Even with current legal uncertainty post-*Rapanos*, the "significant nexus" test articulated by Justice Kennedy calls for analysis of the many functions of waters, both on their own and in combination with other similar waters. The focus is on waters' functions, regardless of how man may have modified some of those water and land features. S.1140's Section 4(b)(3) exclusions basically would legislatively jettison that approach, with huge carve-outs that could be argued to exclude vast swaths of currently protected waters.

For example, the bill states the Clean Water Act would not protect any "system" "used for . . . collecting, conveying, [or] holding" "stormwater or floodwater," "including ditches" along a variety of types of infrastructure. First, "system" is not limited to structures created by man; what about the many types of waters that are of huge value due to how they absorb stormwater or floodwater? What counts as a "ditch" under this bill? And although some ditches indeed might not deserve protection, in urbanized areas many so-called "ditches" are of huge importance. S.1140 might be read to exclude them, regardless of their importance. But by not defining what is meant by "ditches," an issue of huge importance is left uncertain.

Similarly, is it even possible that this bill means to exclude from protection "municipal water supplies," as one could read Section 4(b)(3)(D)? Are waters meant to be excluded merely because they are used for "agricultural or silvicultural purposes"? Since most rivers are used at many points for such purposes, what happens to their protection? The CFR references seem to indicate an intent to offer some regulatory continuity, but then these carve-outs might be argued to cause a major weakening of the law.

Conclusion

In light of its many problematic provisions, we call for rejection of S.1140. The Clean Water Act has been among America's great success stories. We ask this committee and Congress to allow completion of the "waters of the United States" rulemaking. Once a final rule is issued, both supporters and critics can study it with care and respond. The longstanding

bipartisan consensus on protection of America's waters rested on firm foundations and sound science. Worries about a rulemaking that has not even been finished should not provoke a major weakening of the Clean Water Act.

Sincerely,

[Note: University affiliation are presented for identification purposes only. Signatories to this letter join in their individual capacity.]

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Georgetown University Law Center

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Maxine I. Lipeles
Washington University School of Law

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Southern Illinois University School of Law

Dave Owen
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Daniel Rohlf
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Jonathan D. Rosenbloom
Drake Law School

Wendy E. Wagner
Joe A. Worsham Centennial Professor
University of Texas School of Law

Senator WHITEHOUSE. Attacks on this rule from my Republican colleagues have been extreme and seemingly based more on government conspiracy theories than on the actual rule. Here is just a sampling. "Under this plan, there would be no body of water in America, including mud puddles and canals, that would not be at risk from job destroying Federal regulation," said Representative Doc Hastings.

House Small Business Committee Chairman Sam Graves claims, "Permits may be required for activities such as removing debris and vegetation from a ditch, applying pesticides, building a fence or pond or discharging pollutants. Republican Representative Glenn Thompson of Pennsylvania calls the rule "a fundamental threat to our way of life."

"What this means in practice," says Representative Tom McClintock, "is that the Forest Service and the EPA can, under these proposals, require cost prohibitive Federal permits for any proposal tangentially affecting virtually any body of water in the United States."

We have even heard from colleagues on this committee that the rule will jeopardize fireworks on July 4th. I am confident that there will be fireworks on July 4th after this rule goes into effect and it will not be a fundamental threat to our way of life.

The rule maintains the exclusion of prior converted crop land meaning over 50 million acres of Clean Water Act permitting is still not required, excludes the vast majority of roadside ditches and ditches on agricultural land, eliminates jurisdiction over artificially irrigated areas, constructed stock watering ponds, irrigation basins and the like, fully preserves the permitting exemptions for farming, ranching and forestry and clearly states that the Clean Water Act does not apply to groundwater.

In fact, there are areas where I think rational people could say the rule is too weak.

I hope today we will get back to a discussion of this rule, not of the conspiracy theories around it, and that, in my home State of Rhode Island, as in many other States, we see these issues are far too important to our environment and our economy to be talking about imaginary rules.

Thank you.

Senator INHOFE [presiding]. Thank you.

Let me welcome our witnesses. Susan Metzger is the Assistant Secretary, Kansas Department of Agriculture. Mark Pifher is Manager, Southern Delivery System, Colorado Springs Utilities. Robert Pierce is with the Wetland Training Institute, Inc., Maryland. Andrew Lemley is the Government Affairs Representative, New Belgium Brewing Company. Patrick Parenteau is Professor of Law and Senior Counsel, Environmental and Natural Resources Law Clinic, Vermont Law School.

Each of the witness will have 5 minutes for an opening statement. We will start with Susan Metzger.

STATEMENT OF SUSAN METZGER, ASSISTANT SECRETARY, KANSAS DEPARTMENT OF AGRICULTURE

Ms. METZGER. Thank you, Mr. Chairman. Thank you for the opportunity to appear today to provide our support for S. 1140, The Federal Water Quality Protection Act.

In March, we had the opportunity to appear before the Senate Committee on Agriculture, Nutrition and Forestry to share Kansas' perspective on the negative impacts of the Federal rulemaking on Waters of the United States on Kansas water management.

S. 1140 addresses many of those comments and concerns expressed by the States, including Kansas, in response to the draft rule.

With this legislation, the States, as primary implementers of the Clean Water Act, will play a more appropriate and necessary role in crafting a rule that clearly defines Waters of the United States.

S. 1140 recognizes the shortcomings of the original engagement put forth by the Federal agencies by promoting renewed federalism and proper coordination with the States before publication of the rule.

For Kansas, the opportunity for public hearings in different geographic regions, especially in the arid west, is important. Rainfall in western Kansas averages 15 inches per year, generating little runoff, making connectivity in our western stream network tenuous and episodic.

In requiring consultation with the Governors and State water resource agencies, this bill recognizes the variability and uniqueness of each State's hydrology and invites the Federal agencies to use existing State expertise to determine which marginal waters fall under Federal jurisdiction.

S. 1140 clearly establishes groundwater and isolated ponds should not be defined as Waters of the United States. Of particular significance to Kansas is the exclusion of stream reaches that do not contribute flow in a normal year to downstream navigable waters, a typical situation in Western Kansas.

As part of that policy, the legislation requires the establishment of quantifiable measures to determine the volume, duration and frequency of normal flows that constitute significant downstream contributions.

We encourage the Federal agencies to consult with western State water resource agencies and use their in-house knowledge of water availability when establishing these measures.

In Kansas' comment letter to the agencies regarding the proposed rule, we identified the increased costs that would be incurred by the State with the expansion of waters requiring monitoring and assessment.

The letter also identifies other indirect cost impacts related to a rise in third party litigation, increases in mitigation for impacts, and changes in permitting conditions for pesticide and land waste application. S. 1140 appropriately addresses this concern in requiring an analysis of both direct and indirect costs and evaluating the potential for an unfunded mandate.

Of paramount importance, this bill acknowledges that an exclusion of waters from Federal jurisdiction does not mean such excluded waters lack protection through State regulation and man-

agement. Kansas has a track record of progressive and innovative protection of the important waters of the State, whether under Federal jurisdiction or not, noting that not all waters are equally important.

As an example of our State approach, Kansas ranks second in the Nation in sediment reduction and sixth in the Nation for phosphorous reductions through best management and conservation practices.

Allowing for State administrative discretion without ubiquitous, counter-productive Federal oversight, ensures the critical waters of the State, as well as the Nation, will be protected.

The proposed legislation addresses the most significant concerns shared by the State of Kansas in response to the proposed rulemaking on Waters of the U.S.

Thank you for the opportunity to share Kansas' perspective and support for the Federal Water Quality Protection Act.

[The prepared statement of Ms. Metzger follows:]

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Jackie McClaskey, Secretary

Governor Sam Brownback

Mr. Chairman, my name is Susan Metzger and I serve as an Assistant Secretary for the Kansas Department of Agriculture. Thank you for the opportunity to appear today to provide our support for S.1140, the Federal Water Quality Protection Act.

In March we had the opportunity to appear before the Senate Committee on Agriculture, Nutrition and Forestry to share Kansas' perspective on the negative impacts of the Federal rulemaking on Waters of the United States on Kansas water management. S.1140 addresses many of the concerns expressed by States, including Kansas, in response to the draft rule.

With this legislation, the States, as primary implementers of the Clean Water Act, will play a more appropriate and necessary role in crafting a rule that clearly defines Waters of the United States. S.1140 recognizes the shortcomings of the original engagement put forth by the Federal agencies by promoting renewed Federalism and proper coordination with the States before publication of the rule.

For Kansas, the opportunity for public hearings in different geographic regions, especially in the arid west, is important. Rainfall in western Kansas averages 15 inches per year, generating little runoff and making connectivity in our western stream network tenuous and episodic. In requiring consultation with the Governors and state water resource agencies, this bill recognizes the variability and uniqueness of each State's hydrology and invites the Federal agencies to use existing State expertise to determine which marginal waters fall under Federal jurisdiction.

S.1140 clearly establishes groundwater and isolated ponds should not be defined as Waters of the United States. Of particular significance to Kansas is the exclusion of stream reaches that do not contribute flow in a normal year to downstream navigable waters, a typical situation in Western Kansas. As part of that policy, the legislation requires the establishment of quantifiable measures to determine the volume, duration and frequency of normal flows that constitute significant downstream contributions. We encourage the Federal agencies consult with western state water resource agencies and use their in-house knowledge of water availability when establishing these measures.

In Kansas' comment letter to the agencies regarding the proposed rule, we identified the increased costs that would be incurred by the state with the expansion of waters requiring monitoring and assessment. The letter also identifies other indirect cost impacts related to a rise in third party litigation, increases in mitigation for impacts, and changes in permitting conditions for pesticide and land waste application. S.1140 appropriately addresses this concern in requiring an analysis of both direct and indirect costs and evaluating the potential for an unfunded mandate.

Of paramount importance, this bill acknowledges that an exclusion of waters from Federal jurisdiction does not mean such excluded waters lack protection through State regulation and management. Kansas has a track record of progressive and innovative protection of the important waters of the state, whether under Federal jurisdiction or not, noting that not all waters are equally important. As an example of our state approach, Kansas ranks 2nd in the nation in sediment reduction and 6th in the nation for phosphorous reductions through best management and conservation practices. Allowing for States administrative discretion without ubiquitous, counter-productive Federal oversight, ensures the critical waters of the State, as well as the Nation, will be protected.

Mr. Chairman, the proposed legislation addresses the most significant concerns shared by the state of Kansas in response to the proposed rulemaking on Waters of the U.S. Thank you for the opportunity to share Kansas' perspective and support for the Federal Water Quality Protection Act.

United States Senate Committee on Environment and Public Works May 19, 2015 Hearing entitled, "Legislative Hearing on S. 1140, The Federal Water Quality Protection Act." Questions for the Record to Susan Metzger

Chairman Senator Inhofe:

1. Ms. Metzger, Mr. Parenteau testified that: "The science unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence water quality and ecological integrity of navigable waters." You have spent your career working on Clean Water Act issues.

    - How do you respond to those who claim that if a scientist can find any type of connection between a non-navigable, intrastate water and a downstream water the Federal government must be able to exert control?
    - Is there any water that would not be federally regulated under that theory?

Mr. Parenteau and the Federal agencies believe that all tributaries should be jurisdictional because they are connected to the stream system and are poised to contribute flow and material to downstream waters, thereby influencing the physical, chemical and biological nature of those waters. Kansas believes connectivity in the western stream networks is tenuous and episodic, at best.

Kansas ephemeral streams do not automatically possess a significant nexus and more often than not, do not impose impacts on the downstream waters actually used by the citizens of Kansas. Tributaries in western Kansas need more than a bed, bank and high water mark to delineate significance. The frequency of flow supported by regional ground water is equally important and will determine the degree that such channels actually make downstream contributions.

Kansas refutes that, noting especially in the case of western Kansas streams, that the location of the channel above the regional water table, the frequency of flow occurring in the channel and the longitudinal distance between the channel site and actual downstream perennial or seasonal water warrant equal consideration. The latter factors play to the concept of "significant nexus" and connectivity among streams, and more closely embrace Justice Kennedy's insistence that mere hydrologic connection does not bestow ecological significance to certain waters.

If the theory of connectivity as described by Mr. Parenteau were implemented under the Clean Water Act and all streams, regardless of their size or frequency of flow, are connected and influence navigable waters the case could be made that federal jurisdiction applies to nearly all waters. This is not only terrifying from a state and private landowner perspective, it is unnecessary for the appropriate protection of our state and nation's water resources. Application of enhanced Federal oversight is not necessary, given the definition of "waters of the State" within the Kansas Water Quality Standards and the protective narrative provisions provided to such waters by State authority.

Senator INHOFE. Thank you, Ms. Metzger.

You could just as well have been describing Oklahoma as Kansas.

Mr. Pifher.

STATEMENT OF MARK PIFHER, MANAGER, SOUTHERN DELIVERY SYSTEM, COLORADO SPRINGS UTILITIES, ON BEHALF OF THE NATIONAL WATER RESOURCES ASSOCIATION

Mr. PIFHER. Thank you.

Members of the committee, my name is Mark Pifher. I am here today to provide you with the perspective of the members of the National Water Resources Association on S. 1140.

NWRA is a nonpartisan, nonprofit federation whose members are located in the reclamation States of the West and include agricultural and municipal water providers, State water associations, and numerous individuals, including farmers and ranchers.

Our members provide clean water to millions of individuals, families, businesses and agricultural producers.

We have historically been ardent supporters of the Federal Clean Water Act and its goals. Achievement of the goals will assist in the protection of this most valuable resource and assist in protecting our source water for our municipalities and farmers and businesses.

By way of further background, I am the former director of the Colorado Water Quality Control Division and a recent member of the Colorado Water Quality Control Commission, so I am very familiar with these water quality issues and the importance of the Clean Water Act and the Safe Drinking Water Act to our water bodies.

However, that said, we have closely monitored the scope of the rulemaking proposed by the agencies, as have many other western water interests. We filed extensive comments.

As those responsible for providing the water supplies, we believe it is of vital importance to ensure not only that water quality is protected, but also that we have the ability to build the infrastructure necessary to meet water demands without undue impediments that could be raised by the rule as initially proposed.

We acknowledge, based on agency comments given after the rulemaking closed, that there may be some substantive changes to the final version of the rule. We hope that those changes are responsive to some of our express concerns.

We would thank the agencies for their diligent work in this regard. They have been open to receiving our input. That said, it is unfortunate that this proposal has proven to be so controversial from the outset as it need not be because we all share the same goals.

One factor at the root of the controversy was the failure of the agencies to timely initiate consultation with State and local governments and others over the draft rule. The Federal Water Quality Protection Act would assist in rectifying this failure by requiring expanded outreach efforts.

It is the State and local governments and individuals that shoulder much of the cost burden and expense associated with issuing the 401 water quality certifications at the State level, the costs of

meeting project permitting requirements under Sections 402 and 404 of the Act, and the expense associated with the accompanying NEPA reviews once you trigger Federal jurisdiction. It is very important that we get this right.

In particular, we think the agencies fail to recognize unique geologic, hydrologic, and climatic differences across this Country, with particular reference to the arid regions. In that regard, we have many water bodies that are effluent dependent and effluent dominated, dry arroyos, isolated ponds, artificial conveyance systems to move water to places of need, including ditches, and geographically large basins.

I would refer you to the pictures we have attached to my testimony of areas in the arid West that are typical that would probably be included under the new rulemaking that would make it very difficult, frankly, for us to fulfill our individual missions.

Under the rule, adjacent waters and tributaries would all be jurisdictional by rule. You would not have an opportunity to rebut that presumption of jurisdiction. That would be very detrimental to the arid West.

Another shortcoming of the initial proposal was the lack of definitional clarity relative to what is a significant nexus, the word "significant" is not defined, and a failure to focus on the need for water quality impacts, not just hydrologic impacts or other unrelated impacts. We think S. 1140 would rectify those shortcomings.

Also related to the above is a scope of work that was given to the scientists under the Connectivity Report. We think it is undeniable that almost all waters, from rain to evaporation to surface flow to subsurface flow are connected in some manner.

That does not answer the question of whether the connection is significant or whether water quality would be impacted. We think it is imperative to clarify the scope of Federal jurisdiction and to meet the objectives shared by all.

That is especially true in the West where we have a time of drought, floods and fires. The recent fires in Arizona, the drought in California, the unprecedented 2013 floods on the South Platte River in Colorado all underscore the need to build, repair and replace more basin infrastructure and to do it in a very prompt manner without undue restrictions.

This includes reuse facilities; reservoirs, pump-back projects, recycle and reuse facilities, reverse osmosis treatment and groundwater recharge but we cannot do that if our hands are tied.

NWRA supports S. 1140 and looks forward to working with the committee and others, including the agencies, in an attempt to get it right the next time through.

Thank you.

[The prepared statement of Mr. Pifher follows:]

Before the U.S. Senate

Committee on Environment and Public Works

Subcommittee on Fisheries, Water and Wildlife

Legislative Hearing on S. 1140, the Federal Water Quality Protection Act

Testimony of

Mark T. Pifher

Manager, Southern Delivery System

Colorado Springs Utilities

Submitted on behalf of the

National Water Resources Association

May 19, 2015

Mr. Chairman and members of the Subcommittee, my name is Mark Pifher and I am here today to provide you with the perspective of the members of the National Water Resources Association (NWRA) on the Clean Water Act and S.1140. NWRA is a nonpartisan, nonprofit federation whose members are located in the reclamation states of the West and include agricultural and municipal water providers, state water associations, and individuals. Our members provide clean water to millions of individuals, families, businesses and agricultural producers.

NWRA members are western municipal utilities and irrigation districts that provide essential water, wastewater and, at times, stormwater control services to many of your constituents. They have historically been, and will continue to be, ardent supporters of the goals of the federal Clean Water Act (CWA). Achievement of the Acts' goals will assist in the protection and enhancement of the "source water" upon which such entities depend in ensuring that a reliable, safe supply of water can be delivered to meet residential, commercial, agricultural, recreational and aesthetic demands. NWRA members are often on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act (SDWA).

NWRA has been closely monitoring the "waters of the U.S." rulemaking proceeding undertaken by EPA and the Army Corps of Engineers. It, along with many other Western water interests, filed extensive comments on both the proposed rule and the accompanying Connectivity Report which was to be the scientific underpinning for the rule. (NWRAs comments are submitted as a separate document for the Committee's consideration). As those responsible for providing water supplies, we understand the need to protect this most valuable of resources. As water providers, we also understand the vital importance of ensuring that current and future water supply operations are not unnecessarily hindered. In other words, NWRA's concerns about the proposed rule are centered upon a desire to see the Act appropriately implemented.

We acknowledge that based upon agency comments made after the close of the rulemaking record, there may be substantive changes to the proposal as originally issued in any final rule. We hope that these changes are responsive to some of our identified concerns. We thank the agencies for their work in this regard. That said, it is unfortunate that the proposal has proven to be so controversial from the outset.

One factor at the root of such controversy and concern was the failure of the agencies to timely initiate consultation with state and local governments, conservation and conservancy districts, ditch companies, special districts, agricultural interests, public and private utilities and others prior to their issuance of the draft rule. The Federal Water Quality Protection Act (FWQPA) would assist in rectifying this failure by requiring expanded outreach efforts. After all, it is state and local entities who have on-the-ground experience in this arena, and who bear the burden of making this regulatory process work on a daily basis. They also shoulder much of the cost burden, including the expenses associated with issuing the state 401 water quality certifications, the costs of meeting project permitting requirements under sections 402 and 404 of the Act, and the related expenses associated with the accompanying NEPA reviews triggered by a jurisdictional finding.

In particular, the agency proposal failed to recognize the geologic, hydrologic, and climatic differences that exist across this country, with particular reference to the arid West, a region of the country where ephemeral and intermittent water bodies, effluent dependent and effluent dominated streams, dry arroyos, isolated ponds, artificial conveyance systems, including ditches, and geographically large and diverse basins are so common. See attached pictures. Though a one size fits all approach may be easy to craft, it is impossible, in this variable geographic context, to uniformly and equitably enforce. This is especially true where all tributaries and all "adjacent waters" are jurisdictional by rule, isolated or minor water bodies can be aggregated, and there exists no opportunity for a case-by-case jurisdictional determination. The FWQPA recognizes these on-the-ground

differences in its definitions of such terms as "normal year" and "surface hydrological connection"; in its treatment of man-made systems, be they for water storage and conveyance, including reuse and recycling, or wastewater and stormwater treatment; and in its call for the identification of jurisdictional waters through "mapped" stream reaches.

Another shortcoming in the initial proposal was the lack of definitional clarity surrounding both existing terms found in the Act and new terms developed as part of the agency proposal. This includes a failure to define what is "significant" in the establishment of a "significant nexus", a failure to focus on the need for water quality impacts in evaluating the level of relevant connectivity, the failure to adequately describe "riparian area" and "floodplain", new terms utilized in an effort to clarify another new term, i.e., "neighboring", and a failure to clearly explain how one aggregates all similarly situated water bodies in a basin or region, many of which have no historic data base. The FWQPA clarifies key definitional terms in understandable language and, as importantly, does so in a manner which is consistent with the existing language of the Act and interpretations of the Act by the Supreme Court.

Closely related to the above, one must take note of the fact that there evidently was no proper "scope of work" provided to those scientists who prepared the Connectivity Report and those who reviewed its conclusions. It is undeniable that almost all waters, from rain to evaporation to surface flow to subsurface flow are connected in some manner, over some time scale, and in some identifiable geographic area. However, that does not accurately reflect or define the universe of waters that are subject to federal jurisdiction in light of Congress's expressed deference to state authority under the Act and the Supreme Court decisions, such as SWANCC and Rapanos, which clearly indicate that the scope of federal jurisdiction is not unbridled. In addition, the Connectivity Report does not lead us to a determination of what water connections are "significant', particularly in the context of water quality impacts, and fails to honor the long standing need for a Commerce Clause connection before federal oversight is invoked. Various provisions of the FWQPA are designed to address each of these shortcomings by

necessitating that the agencies take into account the above factors as part of their technical and policy analysis.

It is imperative that if we are going to clarify the scope of federal jurisdiction under the Act, an objective shared by almost all parties, we must "get it right". One need only pick up the daily newspaper or watch the evening news to see that we have entered an era, at least in the West, of droughts, floods and fires. The recent fires in Arizona, the drought in California, and the unprecedented 2013 flooding of the South Platte River in Colorado are but a few examples. What each of these natural events has in common is the need to build, repair or replace more drainage basin infrastructure in an attempt to store water for later use, control storm flows for public safety, and repair watershed damage. This includes the construction of new or expanded reservoirs; reuse facilities; desalinization plants; water collection, delivery and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis treatment plants. Of necessity, often times these undertakings will occur in close proximity to the types of "waters" identified in the current rule proposal. We cannot afford to unnecessarily constrain these vital public interest investments by unnecessarily erecting costly and time consuming permitting barriers that yield no significant water quality benefits.

The FWQPA is an honest, thoughtful attempt to provide EPA and the Army Corps with clear Congressional direction as they fulfill their mission of implementing the Clean Water Act, an Act whose goals we all support. NWRA supports S.1140 and looks forward to working with this Committee and others, including the agencies, in an attempt to "get the rule right" this time. This is too important an issue to either act upon in haste or attempt to resolve through endless litigation.

Variable geographic features of the West

Figure 1: Typical dry ephemeral drainage or wash of the arid West

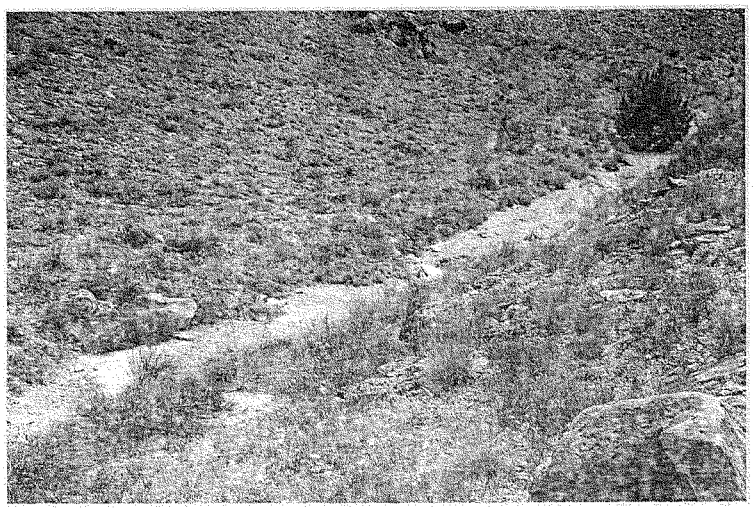

Figure 2: Typical dry ephemeral drainage or wash in canyon country of the arid West. Note that upland vegetation (juniper) is growing in the drainage.

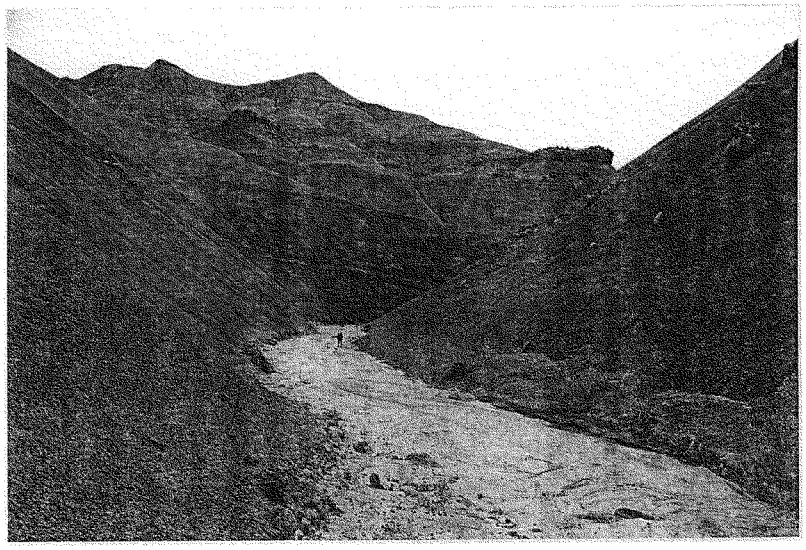

Figure 3: Some ephemeral drainages in the arid West almost completely lack vegetation.

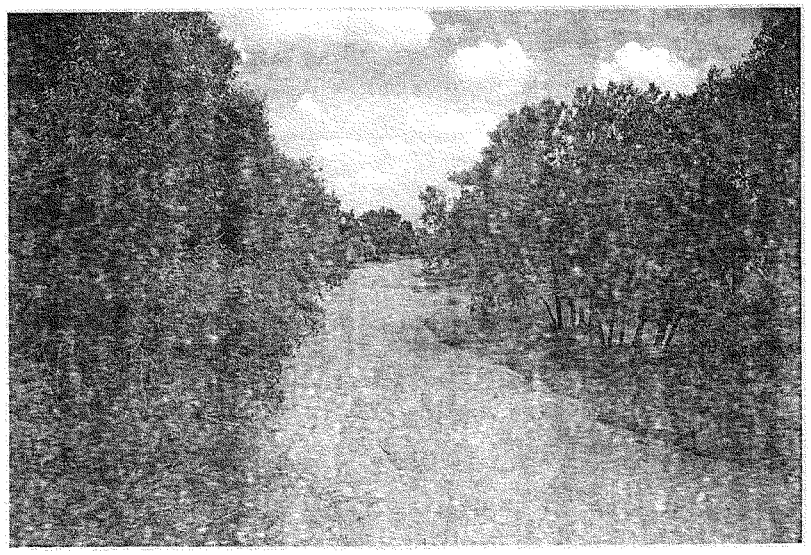

Figure 4: Dry intermittent drainage with riparian vegetation.

Legislative Hearing on S. 1140
Responses to Questions for the Record
By Mark Pifher

Questions from Senator Inhofe

1.a Do you agree that S. 1140 recommends a regulatory presumption that the streams EPA claims are at risk and the streams on EPA's drinking water map are waters of the U.S.?

Response: Yes, section 4 of the bill contains language to this effect.

b. S. 1140 also tells EPA and the Corps to either add or remove parts of streams from the map of jurisdictional streams based on whether pollutants in that part of a stream could actually reach a navigable water. Do you agree that this is an appropriate way to draw the line between state jurisdiction and federal jurisdiction?

Response: Yes, this is a legitimate means of determining whether federal jurisdiction applies. It is consistent with both the language of the Act and Supreme Court opinions interpreting the Act. If no water quality nexus exists between the waterbody in question and what has been identified as a traditional navigable water (TNW), the required federal interest under the Act, which lies in the maintenance in TNWs of that level of water quality necessary to protect identified designated uses, is lacking.

2. Mr. Pifher, do you believe that the reference in the goals of the Clean Water Act to "physical, chemical and biological integrity" refers to protecting the quality of navigable waters to support uses such as swimming, fishing, and provision of drinking water? Or, do you think it is an expression of Congressional intent to regulate any water that provides habitat or water supply or flood control? If the latter were true, would there be any meaningful limits on federal jurisdiction?

Response: One must recognize at the outset that the identification of "goals" or categories of "designated uses" does not determine whether a given water body is subject to federal oversight, i.e., whether there is a legitimate federal

interest. If the waterbody qualifies as a "navigable water" under the Act then, and only then, do the goals, uses and accompanying water quality criteria come into play. For example, section 303(c) of the Act states that water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters...." In establishing such standards for water bodies, a state is to take "into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes...." Hence, to portray the chemical, physical or biological integrity of a water or its designated use as being determinative of its jurisdictional status is to beg the question. In fact, some of these metrics, such as habitat for species, water supply, food source or flood control can be provided, perhaps even more appropriately, by totally dry land, or land which is moist only periodically e.g., a dry hole, lined or unlined, may be most appropriate for meeting flood control purposes. Rather, the question must be whether the TNW and the "other water" function together so closely that the water quality aspects of one are inseparable bound up with the other. In other words, the "other water" becomes a part of the TNW and hence is treated as jurisdictional. If it were Congress' intent to "federalize" any and all activities which might affect, directly or indirectly, a TNW, the reach of federal jurisdiction would be boundless and the underlying framework of the Act, i.e., a method for protecting the quality of navigable waters, while honoring state primacy over land and water use, would be set aside.

Senator SULLIVAN [presiding]. Thank you, Mr. Pifher.
Mr. Pierce, please.

STATEMENT OF ROBERT PIERCE, WETLAND TRAINING INSTITUTE, INC.

Mr. PIERCE. Thank you, Mr. Chairman and members of the committee, for this opportunity.

I have watched the ever continuing geographical expansion of regulation. I fully support the goals of S. 1140 to restore the proper relationship between the Federal and State authorities as specified in Section 101(b).

If EPA's expansive upper limit of Federal jurisdiction is accurate, then Congress did not need an expansive definition of point source in the Clean Water Act including pipes, ditches and channels, all of which the EPA has included under the definition of Waters of the U.S. already.

Within weeks of the Rapanos decisions, many streets in D.C. were flooded by a large storm. Some EPA facilities were flooded as were parts of the National Archives. It sounds like Waters of the U.S. to me.

In 1979, then-Attorney General Civilletti opined that Congress intended EPA to have the ultimate authority to determine the reach of navigable waters. Since that time, the Corps has had no programmatic authority to determine the geographic limits of Section 404.

From 2003 to 2006, I studied flow data from streams in Maricopa County, Arizona. For one project, the Corps told the local delineator that ephemeral channels in the desert that were three to five feet wide should be flagged as jurisdictional. Later, the EPA challenged the Corps and said the channels that were only six inches wide should be flagged.

My analysis revealed that on average streams flowed 1.5 times per year for an average cumulative total of 22.9 hours per year, not even 1 day. How do you define an ordinary high water mark when the ordinary condition of a stream is dry?

In 2014, I testified in the Los Angeles Federal Court in the criminal proceedings against John Appel, charged with discharging fill below the ordinary high water mark into the Ventura River. The EPA and DOJ based their case on a non-EPA technical report that claimed in the arid West, the ordinary high water mark extended to the outer limits of the active flood plain.

In fact, all of Mr. Appel's activities were conducted well away from the true ordinary high water mark as defined in regulation. The jury found him not guilty after just 45 minutes deliberation.

Groundwater is regulated under the Safe Drinking Water Act. Yet, the regional wetland delineation supplements define a water table that is 12 inches below the surface as equivalent to the surface.

Worse, the EPA Connectivity Study allows that water as much as tens of meters below the surface is shallow enough to represent a surface connection. Rather than a technical study focused on connectivity, what was needed was a study on what constitutes significant in the context of significant nexus.

On one occasion, I followed flow on the Santa Cruz River in Arizona in a helicopter. I observed 23 million gallons per day of treated sewage effluent flowing into the river at Tucson and followed the flow until it completely dissipated many miles from its morphological confluence with the Gila River which is still over 200 miles from the Colorado River.

S. 1140 is a good start and will rectify some of the more egregious aspects of the proposed rule and restore balance to a program that has spun out of control. However, I think that it should go further.

S. 1140 should define ordinary high water mark on a quantitative basis. There are multiple methods existing today for determining flow and the ordinary water mark in streams.

While EPA has declared absolutely no uplands located in riparian areas in flood plains can ever be Waters of the U.S., it also endorsed the same report that justified prosecution of John Appel as a good example of local guidance on interpreting ordinary and high water marks. S. 1140 should clarify that streams crossing tribal land boundaries in a single State are not interstate waters under 33 CFR 328.382.

Activities permitted under Section 404 generally are not wasting activities. Nobody discharges fill so that it will wash away. They stabilize it so that it will remain in place, completely intact in perpetuity.

I really think what is needed is a Water Resources Conservation Act. Conservation is wise use and the Corps has been broker for it for over 100 years. I recognize that this is beyond the scope of S. 1140.

If I had the authority, I would excise the Corps' 404 permitting role from the Clean Water Act and put it into a Water Resource Conservation Act. This would cause no increase in pollution and EPA could have an advisory role like other agencies and continue to enforce unpermitted discharges.

Finally, I would not provide dual agency control of different aspects of the program as is in effect with Section 404 of the Clean Water Act. S. 1140 provides a good starting point for straightening out the broken Section 404 program.

Congress needs to compartmentalize responsibilities between the States, tribes and the Federal Government for the upper regions of water courses where the impact on navigable waters of the U.S. under the commerce clause is so tenuous as to not warrant usurpation of State sovereignty.

I will be happy to try and answer any questions you might have.

[The prepared statement of Mr. Pierce follows:]

Statement

of

Robert J. Pierce, Ph.D.

Wetland Training Institute, Inc.

before the

Subcommittee on Fisheries, Water, and Wildlife

Committee on Environment and Public Works

United States Senate

on

Legislative Hearing on S. 1140, The Federal Water Quality Protection Act

May 19, 2015

Mr. Chairman and members of the committee: Thank you for this opportunity to comment on the proposed legislation. That you are taking up this issue will encourage many in the country. That the effort to resolve issues that have festered literally for decades, is bipartisan gives hope that it may reach fruition. It is my intent to put some of the issues into perspective and to offer constructive suggestions that will maximize the benefits to the regulated public.

This year in July will make the 40th that I have been directly involved in working with water resource projects and their regulation. I started with the Corps of Engineers in 1975; 20 days before the Section 404 implementing regulations were published. I left federal service in 1989 to become president of the Wetland Training Institute, Inc. Since that time, I have routinely conducted technical and policy courses related to the Corps' Regulatory Program as well as have served as a consultant to private landowners. During the last week in April, I conducted a 32-hour course *Federal Wetland/Waters Regulatory Policy* in Texas and this past week I taught a 40-hour *Basic Wetland Delineation* course in Maryland.

I have watched the ever-continuing geographical expansion of regulation under the direction of the Environmental Protection Agency (EPA). I fully support the goals of S. 1140 to restore the proper relationship between the federal and state authorities and responsibilities for aquatic and land resources in the Nation as specified in Section 101(b) of the Federal Water Pollution Control Act Amendments of 1972 commonly referred to since 1977 as the Clean Water Act (CWA). By its promulgation of rules pursuant to its parochial concept of the Administrative Procedure Act (APA) requirements and more egregiously by its expansion of federal regulation through memoranda and "guidance" documents not even given cursory APA review, EPA has demonstrated that its institutional mentality is that the Constitution is defective for not granting the federal government primary responsibility for the management of land and water resources. I think that a few historical comments concerning the determination of the geographic extent of jurisdiction under the CWA will put my testimony into context.

In the Rivers and Harbors Act (RHA) of 1899, Congress established a regulatory program administered by the Secretary of War (now Army) and acting through the Chief, U.S. Army Corps of Engineers (Corps). The Corps had regulatory responsibilities under three Sections of the Act: 9, 10 and 13 (commonly known as the Refuse Act). Section 10 was known as the dredge and fill program because in colonial times, material dredged out of navigation channels was often used as structural fill in other waters and wetlands. As the population density became greater and dredged material from metropolitan areas became more contaminated, the use of dredged material for structural fills decreased. In the New York Bight Apex in the early 20th century, for example, there were three designated areas to receive waste material: Sewage Sludge, Cellar Dirt and the Mud and One-man Stone dump sites – the latter for unwanted dredged material.

The geographic extent of Corps authority under the RHA of 1899 was defined as the *navigable waters of the United States.* Until 2007 when "Guidance" was released in response to the Supreme Courts ruling in the Rapanos/Carabell case, these waterbodies were often referred to as *traditional navigable waters* (TNW).

When section 404 was enacted in 1972, Congress, in response to concerns of the navigational dredging industry, carved Section 404 out of the responsibilities of the EPA and gave it to the Corps. Congress directed the Secretary of the Army to regulate the **discharge** of dredged and fill material into *navigable waters* defined in Section 502 as *the waters of the United States.* In addition, Congress also stripped the Corps of its regulation of wasting operations under Section 13 of the RHA of 1899 and assigned that responsibility to EPA under Sections 402 and 405 of the CWA. Later in 1972, the COE published proposed regulations that addressed an expanded geographic jurisdiction for the Section 404 program.

However, by 1974, the Corps HQ Office of Council undertook an extensive legal review (including court decisions related to navigational servitude) concluding that when Congress had directed it to regulate navigable waters of the U.S. under the RHA of 1899, Congress intended the Corps to regulate waters to the full extent of the Commerce Clause of the Constitution. It retracted the expanded jurisdiction, stating that:

> The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term, which is soundly based on this premise and the judicial precedents, which have reinforced it. Accordingly, we feel that in the administration of this regulatory program, both terms should be treated synonymously. [39 FR 12115]

On July 25, 1975, as a result of an adverse court decision, the Corps published revised regulations that expanded jurisdiction beyond the navigable waters of the U.S. to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the U.S., all interstate waters, certain intrastate waters, adjacent wetlands, and manmade navigable canals. Drainage and irrigation ditches were excluded. The regulation also defined the term *ordinary high water mark* (OHWM):

> ...used as a measurement point to determine the extent of federal jurisdiction in inland freshwater rivers, streams and lakes that do not have wetlands contiguous or adjacent to them, is established as that point on shore which is

> inundated 25% of the time (derived by a flow duration curve based on available water stage data). [40 FR 31321]

On September 5, 1975, EPA published separate definitions for *navigable waters of the United States* pursuant to the RHA of 1899 and *navigable waters* pursuant to the CWA. [40 FR 41297]. It also defined the (OHWM):

> ...with respect to inland fresh water means the line on the shore established by analysis of the daily high waters. It is established as that point on the shore that is inundated 25% of the time and is derived by a flow-duration curve for the particular water body that is based on available water stage data. It may also be estimated by erosion or easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation or its inability to grow, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area. [40 FR 41297]

On July 19, 1977, the Corps published definitions for the term *navigable waters of the United States* pursuant to the RHA of 1899 and *waters of the U.S.* pursuant to the CWA [42 FR 37144]. That rule also phased in expanded jurisdiction under Section 404 [42 FR 37145]. That same rule defined *primary tributaries* as:

> The main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries. [42 FR 37145]

The Corps also removed the quantitative element to the definition of OHWM and simply defined it as:

> that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that considers the characteristics of the surrounding areas.

This definition remains in use to this day.

The above demonstrates the public face of the interagency disputes relative to the geographic extent of Section 404, which was the only provision of the CWA not under the complete control of the EPA. As one who worked for the Corps during and following that period, the internal frustration and feeling of professional impotency that Congress levied on the Corps was immense. The Chief of Regulatory at Corps HQ took to referring to himself as the "head clerk." If no other lesson is learned from the sad state of affairs that is the current 404 program and which necessitates S. 1140, Congress needs to remember that it is a recipe for disaster to give one Executive agency final authority over critical elements of a program administered by another Executive agency.

In an effort to resolve the geographical limits dispute, on March 29, 1979, the Secretary of the Army asked then Attorney General Benjamin Civiletti two questions:

1. *...whether the act gives the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of §404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency*; and
2. *...whether the Act gives the ultimate administrative authority to determine the meaning of §404(f) to you or the Administrator.*

On September 5, 1979, AG Civiletti responded in a seven-page memo, the pertinent part of which stated:

> *I am convinced, after careful consideration of the Act as a whole that Congress intended to confer upon the Administrator of the Environmental Protection Agency the final administrative authority to make those determinations.*

Since that time, the Corps has had no authority to determine programmatically the geographic limits of Section 404 of the CWA.

This brings us to what I consider the first aspect of S. 1140 that should be changed. It is written as if the COE and EPA have an equal relationship relative to the geographic extent of regulation of waters of the U.S. Since Civilletti, the COE has had nothing more than a commenting role on the extent of jurisdiction - a fundamental aspect of the program it supposedly controls. As long as Civilletti stands, it is absurd to direct the COE to publish regulations or to alter what constitutes waters of the U.S. because at the Executive Branch level, the EPA has the final say as to what is the geographic extent of waters of the U.S.

In 2003, I conducted a quantitative hydrologic study of existing data from 50 gages on streams in Maricopa County, Arizona ranging in width from 2 feet to 400 feet. This study was in support of possible revisions to the CWA that were being discussed. The gauge data demonstrated that flow in the streams of Maricopa County could be expected for less than one percent of the year on average.

In 2005-2006, I worked on another project in Maricopa County, Arizona, where the local wetland delineator received guidance from the Corps that ephemeral channels in the desert that were three to five-feet wide should be flagged as jurisdictional. Later, the EPA said that channels that were at least six inches wide should be flagged. My analyses of 11 streams on or near the studied property, with catchment sizes one to three orders of magnitude larger than those 3-5'-wide features delineated on the property, revealed that on average streams flowed 1.5 times per year for an average cumulative total of 22.9 hours – not even one day during the entire year. Only two streams flowed for even 1 percent of the year. How do you define an OHWM when the ordinary condition of a stream is dry?

In 2014, I testified in the Los Angeles Federal District Court in the criminal proceedings against John Appel for purportedly discharging fill material below the Ordinary High Water Mark (OHWM) into the Ventura River. Mr. Appel had been convicted in a civil case a number of years prior and the EPA decided that he had continued to discharge into waters of the U.S. EPA and Department of Justice based their case on a non-APA technical report adopted by the LA District of the Corps that claimed that in the arid west,

the OHWM extended to the outer limits of the active floodplain. Mr. Appel was subjected to years of litigation because he lived and operated his tree-trimming business on his 30 acres of nonwetland floodplain. All of his activities were conducted well away from the true OHWM as defined in regulation. I am pleased to say that after just 45 minutes of deliberation, the jury found Mr. Appel not guilty on all four counts with which he was charged.

Here we are today with EPA trying to regulate ephemeral channels whose only connection to navigable waters of the U.S. are that they might recharge ground water. The proposed rule was based upon a study that was misguided in its direction and had not even received final technical review by an external panel of scientists. On the positive side, the 2014 proposed rule was at least the first signs that EPA might finally adhere to the APA instead of introducing or modifying regulations by memoranda and guidelines.

Being used to reviewing and commenting on proposed regulations, I have structured the following as comments and suggested revisions to proposed S. 1140.

p.1 A Bill: To require the Secretary of the Army… On the first page and in numerous places thereafter, S. 1140 directs both the Secretary and the Administrator to undertake tasks related to the extent of waters of the U.S.. In several places it uses the conjunction "or" instead of "and" suggesting that either agency can accomplish the directive. I do not believe that Congress should require the Secretary to do something that it has no authority to do. Our military follows orders. In 1979, A.G. Civilletti opined that the EPA had the authority to define the geographic limits of jurisdiction under the CWA and specifically NOT the COE. Until the Civiletti opinion is vacated, the Corps undoubtedly will follow orders and not initiate a change. S.1140 perpetuates the myth that the Corps has any control over the geographic extent of the regulatory program it operates. Since 1979, virtually every geographic expansion of Section 404 regulation has been at the instigation of the EPA - not the Corps of Engineers. But like the professional military organization that it is, the Corps has implemented its orders without voicing criticism externally, although if its staff were able to speak candidly, not, I think, without great frustration and disagreement. In 1979 a general, albeit an attorney general, gave an order and the military marched on. Had not an earlier Congress that enacted the Federal Water Pollution Control Act Amendments of 1972 saddled the Nation with the absurd construct of one executive agency (EPA) controlling the fundamental precept of the program of another (Corps) that is Section 404, we would not be facing the more absurd premise that there are more miles of regulated waterbodies per area in the desert than there are per area in the more humid regions of the Nation and there would be no need for this legislation.

p.1 Line 4. This Act is really more about federalism and the extent of the federal government's authority under the Commerce Clause of the Constitution than water quality. My recommendation is that S. 1140 actually define the upper, Constitutional limit of federal jurisdiction of waters under the Commerce Clause and eventually, perhaps, the Supreme Court will finalize the debate.

p. 2. I fully support the recognition that S. 1140 gives to Section 101(b) of the Clean Water Act. For too many decades, EPA has simply ignored it. I have watched through my entire professional career as EPA continued its ever-expanding agenda to establish a

federal land management authority in spite of the Constitution and Section 101(b) of the CWA.

p. 3, lines 23-25, (2), and p. 7, lines 8 to 12, (12). Since Rapanos/Carabell, EPA has constructed and the Corps has implemented a new set of *traditional navigable waters* especially for the CWA. S. 1140 relies upon the same regulation [33 CFR 328.3(a)(1)] that was the basis of this revised definition of the term *traditional navigable waters* leaving the reasonable assumption that the agencies will continue to misuse the concepts. It is clear to me and others, that the Supreme Court Justices simply used the term *traditional navigable waters* as a shorthand version of *navigable waters of the United States*.

> Justice Kennedy, like the plurality, expressed the view that an inland water is traditionally navigable only if it forms a continued highway over which commerce is carried into another state or country by water. Like the plurality, Justice Kennedy has concluded that there is only one set of traditional navigable waters and that it is synonymous with "navigable waters of the United States."[1]

I fear that if S. 1140 does not specifically disavow the current interpretation, that upon its enactment, EPA will direct the Corps to continue with the post-Rapanos misuse of the term. As the entire S. 1140 affirms, "an once of prevention...." I suggest that the following sentence be added to the definition of *traditional navigable waters* at p. 7, line 12:

> This term is synonymous with the term *navigable waters of the U.S.* as described in Section 329.4 of title 33, Code of Federal Regulations (as in effect on the date of enactment of this Act).

p. 4., lines 6-9, (4). In defining "isolated" S. 1140 uses the term "surface hydrologic connection." This committee needs to be aware that in defining "wetlands" the Regional Supplements to the 1987 Wetland Delineation Manual, have dropped the phrase "to the surface" that previously existed in the definition of wetland hydrology. Furthermore, those Supplements define a water table that is12 inches beneath the surface for 14 days out of 730 as satisfying the hydrologic requirement for a wetland, i.e., 12 inches below the surface is the equivalent of *to the surface*. Thus, the definition of Isolated in S. 1140 does nothing to actually keep the water at the interface between substrate and air.

Perhaps most egregious is that the EPA Connectivity Study which formed the basis for the 2014 Proposed Rule, allows that water as much as tens of meters (p. 2-1) below the surface is shallow enough to represent a surface connection[2]. Global connectivity has been recognized long before Barbara Ward published *Spaceship Earth* in 1966.

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[1] David E. Dearing. 2007. The Continued Highway Requirement as a Factor in Clean Water Act Jurisdiction ENVIRONMENTAL LAW REPORTER, 37: 10005 - 10013.

[2] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.

Rather than a technical study focused on connectivity, what was needed was a study on what constitutes *significant* in the context of *significant nexus*.

p. 4, lines 20-24, (6)(A). The concept of meteorological "normals" really comes from the NCDC. It is true that NRCS uses the concept but in fact relies upon data collected by the NCDC in any hydrologic products it produces.

p. 5, line 5. S. 1140 should redefine OHWM to be quantitative similar to it was in the 1975 EPA regulation [40 FR 31321 and 40 FR 41297]. Even better would be to factor Luna Leopold's discussion of Mean Annual Flow that represents a flow that is exceeded about 25- 30 % of the year and fills the channel about 1/3 full.[3] Specifying a duration of water flow is, I think, key to preventing the freelance expansion of jurisdiction – such as redefining what the OHWM to include the entire active floodplain as the LA District of the Corps did in 2008. This ties into p.6, line 3.

p.5. line 24. I suggest adding the phrase *acting through the Corps of Engineers* after the word *Army*

p. 6, line 3. as above, I recommend that S. 1140 define OHWM for purposes of it and the CWA and it should be defined more in line with court cases and be quantitative. I can provide a copy of a discussion of the court cases if requested.

p. 6, line 20 to p.7, line 7. I do not think that this definition of Continuousness is in keeping with the Pluralities opinion in the Rapanos/Carabell case. Especially in the arid west, there can be erosion channels that would meet this definition that arise because of extreme flood events that may never have ordinary flow. Furthermore, in many instances, the actual flow that does occur sporadically and in response to heavy precipitation events may never reach navigable waters of the U.S. because of transmission losses. Stream transmission losses are not a trivial matter. One one occasion, I followed flow in the Santa Cruz River in Arizona. On the particular day, USGS documented zero discharge in the Santa Cruz south of Tuscon. I observed at the northern end of Tuscon, documented 23 million gallons of treated sewage effluent in the River on the north side of Tuscon and followed the flow until it completely dissipated many miles (southeast of Phoenix) from its morphological confluence with the the Gila River (sections of which are now considered Traditionally Navigable Waters since the Rapanos/Carabell Supreme Court Ruling) which is still over 200 miles from its Colorado River (a navigable water of the U.S. under Section 10 of the RHA of 1899) confluence. I can provide a copy of this report if requested.

p. 6, line 7 to p. 7. line 7, (11).

A. In dealing with hydrology, I think that S. 1140 should specify stream flow in terms of the USGS and other agencies' stream gauges and computational formulae. OHWM should be quantitative and the numbers will come from USGS and some few other sources (e.g., flood control agencies at the state and/or local level).

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[3] Leopold, L.B. 1994. A view of the river. Harvard University Press, Massachusetts. p. 229

B. The hyporheic zone needs to be evaluated as to consistency with the CWA versus the Safe Drinking Water Act.

C. Primarily in the arid west there can be continuous morphological connection formed during major floods with continuous flow almost never.

D. The whole issue of ditches and storm drain systems needs to be addressed. A ditch is a poor man's storm drain. Under current construct since SWANCC, water resources that may otherwise be considered isolated are regulated as waters of the U.S. if they are connected by either.

E. I recommend that S. 1140 define the term *Reach* since it has become an important element in the onerous process of documenting jurisdictional waters. Under current practice, to process a final jurisdictional determination (JD), the Corps requires that a detailed, 8-page form be completed for each reach of a stream. Some Corps districts have implied to the private sector that it is its responsibility to complete the forms. Even those districts that readily admit that it is a federal responsibility to complete the JD forms, have long delays in processing JDs simply because of the workload. I suggest that if the agencies once determine the upper limit of federal jurisdiction on a watercourse, that the requirement to complete JD forms be terminated.

p. 7, line 8, (12). I agree with the definition of the term *Traditional Navigable Waters* (TNW) as far as it goes. As mentioned above, however, I recommend that the following sentence be added to the definition to make it unequivocal:

> This term is synonymous with the term *navigable waters of the U.S.* as described in Section 329.4 of title 33, Code of Federal Regulations (as in effect on the date of enactment of this Act).

The term *tributary* needs to be defined in this legislation since it is not in the CWA. I suggest that the correct limit of federal jurisdiction under the CWA is in many cases is captured by the term *primary tributary*:

> ...the main stems of navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries. [42 FR 37145]

p. 7, line 13, (13). It is not enough to say that the term *wetland* should be defined as it currently is. As mentioned above, the Regional Supplements to the 1987 Wetland Delineation Manual have deleted the phrase *to the surface* from the definition of *wetland hydrology* and substituted *at or near the surface*. To the surface was added to the 1987 Manual because of the recognition that ground water is regulated under the Safe Drinking Water Act. The consequence of this substitution is that a water table that rises no closer to the land surface than 12" below for two weeks during the growing season is considered wetland hydrology. I think that the only way that the true *surface* is going to be implemented is if the legislation specifies "the soil and air interface."

p. 8, lines 18 thorough p. 9, line 11. A provision must be made for those streams that otherwise should be regulated based on the concepts described at (C) [p.9, lines 12 -20 as

amended below] that are not depicted, or depicted inaccurately on existing maps. As Luna B. Leopold upon becoming Chief Hydrologist for the USGS later related:[4]

> I tried to devise a way of defining hydrologic criteria for the channels shown on topographic maps and developed promising procedures. None were acceptable to the topographers; however, I learned that the blue lines on a map are drawn by nonprofessional, low-salaried personnel. In actual fact, they are drawn to fit a rather personalized aesthetic.

I highly recommend that all that are involved in drafting S 1140 read Leopold's *A View of the River*, which is extremely well-written, readily understandable by non-hydrologists, and discusses in simplified language all of the technical water relationships that are or need be addressed in this legislation.

p. 9, line 12, (C). I fully agree that consideration of *sufficient volume, duration and frequency* should be key elements in determining the upslope extent of federal jurisdiction. Because of transmission losses, distance from the tributary to the TNW should be added to that list.[5] Furthermore, setting a standard relying solely on "that would degrade the water quality" simply adds another debatable variable to the process. To reduce the likelihood of subsequent abuse, I suggest that the requirement should read:

> ... the reach of a stream, that through a continuous surface hydrologic connection and after consideration of transmission losses and natural sediment flow, contributes water flow in a normal year of sufficient volume, duration and frequency, that would be measurable with standard, stream-flow gauges that pollutants in that reach would be delivered to the TNW, and after consideration of the dilution factor of the existing flow in the TNW, the transported pollutants would be detectable in the TNW with standard water quality measurement equipment and are at concentrations that degrade as determined by application of appropriate water quality standards.

p. 10, lines 3. I recommend that the tense of the verb be changed from "should" to "do not include" or "shall not include"

p. 10, lines 4-6, (A). Change to read "...below the air/surface of the land interface,..."

p. 10, lines 7-8, (B). As discussed above, the definition of "wetland hydrology" in the 1987 wetland delineation manual specifies that ground water must reach the surface. The agencies currently interpret that a water table at 12" below the surface is the same as to the surface. The definition of *body of water* in S. 1140 includes wetlands.

p. 10, lines 15-24, (D). Add an exception: "except for natural streams that satisfy the concepts described at (C) [p.9, lines 12 -20 as amended] that have been channelized as part of a flood control or other project."

p. 11, lines 23 to p. 12, line 6, (E). There is the same problem of debate associated with *degrade* that I identified above. Same correction suggested.

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[4] Leopold, L.B. 1994. A view of the river. Harvard University Press, Massachusetts. p. 228.

[5] Cataldo, J.C., C. Behr, F.A. Montalto and R. J. Pierce. 2010. Prediction of transmission losses in ephemeral streams, Western U.S.A. The Open Hydrology Journal. 4: 19-34.

p. 10, line 15 to p. 12, line19 (3)(D). I find this entire subsection to be very confusing and suggest a rewrite. Negatives tend to get piled upon negatives. I am not an attorney, but reasonably well-educated with considerable experience in working with laws and regulations, and after multiple readings, I still am uncertain what is and what isn't.

p.13, lines 3-8 (A). Implementation of Sec 404 did not occur uniformly throughout the Nation. I suggest that S. 1140 use the phase-in dates specified at 42 FR 37145.

p. 13, lines 17-20. The entire issue of *point source* is one that should be explored thoroughly and clarified in S. 1140. The definition in the CWA at Section 502(14) includes pipes, ditches, channels, etc. – all the conveyances that the EPA has gradually included under the definition of waters of the U.S. and thus subjected them to Section 404 jurisdiction. EPA has not pushed storm drains in major cities such as Washington, D.C., which logically would be included under the EPA concept of waters of the U.S – but perhaps, the EPA corporate consciousness shrewdly realized that doing so might tip the balance and cause a backlash. Within weeks of the Rapanos Supreme Court decision, in 2006, many streets in D.C. were flooded by a large storm. As I recall, some of EPA facilities were flooded as were some rooms at the National Archives. I have often wondered if this storm had hit a few weeks **before** the decision, first, if J. Kennedy would have been as eager to include infrequent, major storms as being events that should be factored into the extent of regulatory jurisdiction; and second, whether J. Scalia would have attacked J. Kennedy's position more based on the streets and cellars of D.C. being waters of the U.S.

p. 14, line 11. I suggested that it be changed to read: "...(U.S.C. 1344(f)(1)), **not recaptured under Section 404(f)(2)...(USC citation).**"

p.14, line 15, (5). As long as the Civiletti Opinion stands, the Secretary cannot revise the definition of the waters of the U.S. Only EPA can do that.

p. 14, line18, (A). I suggest that it be changed to read: "...including a migratory bird **or flying insect**, does...

p. 15, line 11-19, (C). I suggest it be changed to read: "...in an aquifer **are parts of the water cycle which may connect...**

p.15, line 20-23, (6). I suggest that this be modified to read: "...on maps **or digital media** provided by the Secretary and Administrator and **made readily available to the public depicting the upper limits and give numeric limits such as river mile or latitudinal and longitudinal coordinates...**

p. 16, line 15, (A). This line should read: "... criteria and **meaningful** consultation..."

p. 17, lines 4-25 (B). Several parts of this section discuss consultation with state and local governments. Since the National Flood Insurance Act of 1968 (P. L. 90-448), Congress has consistently held that state and local governments, not federal agencies, should have primary responsibility for managing the floodplains within their respective jurisdictions with assistance-only from the Corps, FEMA and other federal agencies. This section of S. 1140 does not, however, clearly state that consultation needs occur with the floodplain management agencies – only "flood control." There are many documents that clearly indicate the Corps' role regarding floodplains – none of which entail regulating non-water portions of the floodplain (e.g., 77 FR 10218, 77 FR 10244-10245 and 77 FR 10246). At first glance, even the EPA in its 2014

Proposed Rule seemed to acknowledge that non-waters in floodplains are not subject to Section 404:

> Absolutely no uplands located in "riparian areas" and "floodplains" can ever be waters of the United States subject to jurisdiction of the CWA. [79 FR 22207]

Later in the proposed rule (79 FR 22259-22260), however, EPA endorsed the same 2008 Technical Report[6] (that was used to justify the criminal prosecution of John Appel) as a good example of local guidance on interpreting OHWMs. Either this is the height of duplicity (by arguing that the entire 100-year floodplain is within the channel as defined by the OHWM), or the authors of the Proposed Rule have never read or at least understood the substance of ERDC/CRREL TR–08–12, because the fundamental concept of that process adopted by the LA District without compliance with the APA, encompasses all of the active floodplain (up to a 100-year recurrence event) within the OHWM. If EPA adopted the expansive definition OHWM that the LA District of the Corps uses in the arid west, then all of the 100-year floodplain would be below the OHWM and, thus, subject to Section 404 regulation. Even the possibility of such action by EPA makes it imperative that the term OHWM be quantitatively defined in S. 1140 and made applicable to the CWA since it is not defined in it and is such an integral part of jurisdictional determinations, especially at the longitudinal limits of federal jurisdiction.

p. 18, line 9. Change to read "...State/local regulation." In some states (e.g., Massachusetts, regulation is at the local level and each local conservation agency can define its jurisdiction under state enabling legislation.

p. 18, lines 17-18. The subtlety between "geomorphological features" and "hydrologic features" suggests that the distinction will be open to dispute – especially since S. 1140 does not define either term. History demonstrates that if anything related to Section 404 is the least bit ambiguous or debatable, EPA will adopt the position that leads to the most regulation of the landscape.

p. 18, line 23. (3). If no other change is made in S. 1140, please do not saddle the public with another use of "significant" – especially without a comprehensive definition that is unequivocal. Science specifies **significant differences** through statistical analyses. The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) if there may be **significant impacts** on the human or natural environment. The Supreme Court has used the concept of **significant nexus** in two cases dealing with Section 404. In the most recent (Rapanos/Carabell), Justice Kennedy made it the central concept of his legal opinion. He doomed reasonableness when he followed with a sentence that contrasted *significant* with *speculative or insubstantial*. EPA latched on to the terms and imposed non-APA-derived "guidance" that held in effect that anything that is not speculative or insubstantial is significant. On March 30, 1987, Corps Headquarters issued to all its subordinate commands, Regulatory Guidance Letter (RGL)

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[6] R. W. Lichvar and S.M. McColley, U.S. Army Corps of Engineers, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual, ERDC/CRREL TR-08-12 (2008)

87-2 entitled *Use of the word "significant" in regulatory actions*. The concluding caution of that RGL was:

> The central point is that use of the word "significant" or equivalent words in permit documentation implies certain legal consequences under NEPA and the 404(b)(1) Guidelines, so one should use the word advisedly and with thorough explanation and documentation in the administrative record to support its use.

I drafted that RGL in 1987 and I believe that the caution is as timely if not more so now. The term *significant nexus* as currently used by EPA contrasts markedly with other aspects of the Section 404 Regulatory Program. Many activities that are more than speculative or insubstantial are permitted without the preparation of an EIS under NEPA. There are many activities that do not qualify for general permits because the impacts are more than minimal, but they do not reach the "significant" threshold. Similarly, there is a category of nexus (causal connection) between insubstantial and significant – but EPA has, with the stroke of a "guidance" pen, eliminated it.

There is discussion in the latter part of S. 1140 that provides directives on addressing various Executive Orders (EO). I have not read most of the referenced EOs (and have no real desire to read them). However, it has been my observation over the last four decades, that various administrations have differing appreciation for EOs issued by previous administrations and that affects the implementation of them. It seems to me to be less equivocal to include the substantive parts of the various EOs in S. 1140, rather than depending upon the whims of future administrations.

p. 25, lines 6-13, Sec. 5, Measure of flow. There are multiple methods existing today for determining flow in streams. The USGS has an extensive array of stream gauges in every state and the data are readily available through the Internet. Some counties in states, especially those that have a recurring problem with flash floods, have early warning systems that rely on stream gauges on streams not instrumented by USGS. Maricopa County, Arizona is one such location where I conducted an analysis of stream flow from existing gauges. For ungaged streams, flows can be measured and/or computed using Manning's Equation, the Rational Method (TR-55), averaging techniques and a host of other methods. EPA has a page on its website[7] that provides guidance on measuring stream flow. There are numerous computer simulations programs that can also be used to compute flows under different precipitation events. The Corps' Hydrologic Engineering Center (HEC) in California is fully competent to provide process for such analyses and has been doing so for decades. Every state transportation department in the Nation routinely computes estimated flows based upon historic precipitation data to size culverts for installation and replacement. Many private engineering firms throughout the Nation estimate runoff and discharge to properly size stormwater management facilities.

As part of my technical analyses on and neighboring the Appel property I used Manning's equation, the measured width of the channel and the Mean Annual Flow concept[8] to predict the height of the OHWM above the bottom of the Ventura River and compared it with observed physical characteristics of the OHWM. This analysis

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[7] http://water.epa.gov/type/rsl/monitoring/vms51.cfm

demonstrated that a quantitative approach to defining OHWM is appropriate and yields results comparable to the current practice of relying on observation of physical characteristics.[8]

p. 25, line 11. I suggest that the word "pollutants" be replaced with the phrase "toxic substances in toxic amounts." Line 12-13, I suggest as I have above that a less debatable term than "degrade water quality" be adopted.

p. 27, lines 9-10 (2). Under the CWA, the Corps only has the authority to enforce permit condition violations – not unpermitted discharges. Only EPA has the authority to enforce all unpermitted activities. My reading of the CWA, Section 309, provides EPA with all the enforcement authority it needs to follow point sources to their origin even to the floor drain in the middle of a warehouse or factory. A point source includes discharges of dredged or fill material from a conveyance. EPA simply has taken the easy way out and decided that prosecution will be simpler if everything to the drain spout on a building is defined as a water of the U.S. It seems to me that if EPA's concept of the upper limit of CWA jurisdiction is accurate, then Congress did not need to have an expansive definition of *point source* in 1972. But Congress did expansively define *point source* in 1972, suggesting that the authors did not envision, every place that water molecules might flow under any event to be waters of the U.S.

In numerous locations throughout it, S. 1140, mentions tribal governments. Over the years, I have had the good fortune to work with a number of Native American Peoples including the Oneida, Blackfoot, Crow, Salish-Kooteney, Santa Clara Pueblo and Navajo Nations. I have observed a special injustice leveled upon tribal nations under Section 404 of the CWA. It is not uncommon, especially in the western U.S., for a stream originating in the mountains to gain flow as it progresses down slope only to transition to a hydrologic loosing stream when it emerges from the mountains onto the flat plains. Transmission losses may be of such a magnitude that the stream may not only cease to flow, but the morphological channel may completely dissipate. If such a stream was located entirely within the geographic boundaries of Arizona, for example, the stream likely would not be a water of the U.S. because it would be an intrastate waterbody, the use or degradation of which would NOT effect interstate or foreign commerce as required under 33CFR 328.3(X). However, if that same stream originated in the mountains on Navajo lands and crossed the tribal lands boundary - still entirely within Arizona - it would be declared an interstate water of the U.S. under 33CFR 328.3(Y) and be regulated. I find it ironic that agencies use the sovereignty of the tribal nations as justification to regulate waterbodies on tribal lands that would not be regulated on nontribal lands. This committee through S.1140 should address this injustice and not penalize Native American tribes for the soverngty established by treaty with the federal government.

While S 1140 is an attempt in the right direction, my fear is that it is inadequate to accomplish the intent to bring reasonableness back into the regulation of discharges of dredged and fill material into waters of the U.S. In 1989, the federal court in Alaska

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[8] http://www.wetlandtraining.com/wp-content/uploads/2014/07/Report-on-Conditions-on-and-Adjacent-to-the-Appel-Property-%E2%80%93-Robert-J.-Pierce-Ph.D.-2014.pdf

dismissed (as being not ripe for adjudication) a suit brought by the City of Anchorage over a MOA between EPA and the Corps on mitigation[9] that had not gone through APA rulemaking. The MOA specified changes in procedure that the Corps would implement in the future. EPA reissued the MOA on February 6, 1990, with the only changes being that most future tense verbs were changed to present tense suggesting that the Corps had already been implementing the procedures of the MOA when they had not been.

When the Supreme Court ruled in SWANCC that Congress showed no intent for intrastate, nonnavigable, isolated waters to be regulated under Section 404, one would have expected that the jurisdictional extent of waters regulated would have decreased. Yet within six months roadside ditches, wetlands theoretically connected by nonjurisdictional swales, drain tiles and storm sewers all became jurisdictional or flow-through paths that extended jurisdiction. The migratory bird "rule" was replaced by the migratory molecule "rule."

The Supreme Court ruled on the Rapanos/Carabell cases in June 2006. "Guidance" came out in June 2007, was revised in 2008 and has never yet gone through final APA procedures. Yet the "guidance" was implemented as rule and applied to all Section 404 regulatory actions throughout the Nation. If nothing else, EPA is creative and persistent in it's effort to control all water-use decisions even to the most remote reaches of the states.

The Corps regulatory program under Section 10 and under Section 404 is not really about water quality – it is about the prudent use of aquatic resources. Before EPA existed, the Corps had a water quality role under Sec 13 of the RHHA of 1899. Congress stripped the Corps of that role in 1972 and placed the concerns of Sec. 13 under Sections 402 and 405 of the CWA. No Section 404 permit has ever been issued before the states and increasingly tribal governments have had the opportunity to determine if water quality would be compromised by the discharge of dredge or fill material pursuant to Section 401 of the CWA. Furthermore, conditions placed on Corps permits require that fill must be free from toxic pollutants in toxic amounts, stabilized to prevent soil erosion and properly maintained.

What the Corps does in its Regulatory Program is essentially the same as it does for Congress, when it considers authorizing a new or expanded water resources project. For Congress, the Corps analyzes the pros and cons of a project evaluating all aspects of the public interest and produces a report upon which Congress can act. In the Regulatory Program, the Corps does a similar review and prepares a record of decision on all factors of the public interest, including water quality, and either issues or denies a permit. Just as a bill authorizing a new dam or levee, or a farm bill, or a transportation bill have water quality implications, they are not water quality laws - they are resource use bills.

An inconsequential number of 404 permits are for the discharges back into waters of the U.S. for the purpose of disposing of the dredged material. Discharges of dredged and fill material permitted under Section 404 generally are not wasting activities. It costs too

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[9] Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the determination of mitigation under the Clean Water Act Section 404(b)(1) Guidelines, signed November 15 1989.

much to find, excavate, haul, level and stabilize fill. People apply for Section 404 permits for the purpose of constructing a structural fill. Discharged material is normally clean, natural geologic material and often very coarse requiring high velocities to erode. Because of the extra stabilization required, structural fills placed in waters of the U.S. are less likely to erode and pollute streams than fill placed in upland locations outside waters of the U.S. where federal oversight is totally lacking. Natural sediment loads (especially in drylands) often are huge in comparison to any incidental erosion from intentionally placed fills. NOBODY DISCHARGES FILL SO THAT IT WILL WASH AWAY. They stabilize it so that it will remain in place completely intact in perpetuity. That is why required state 401 Water Quality Certifications are routinely granted for most Section 404 permits - the fills do not violate state water quality standards.

I first advanced this concept in 2003.[10] During oral arguments in the Rapanos/Carabell Supreme Court case, Justice Souter asked the attorney for Rapanos if he wanted to draw a distinction between the dredge and fill addition and a conventional synthetic poison. The attorney responded "no." Had it not been for the fear of being shot by Secret Service agents watching the peanut gallery, I would have jumped up shouting "yes, yes, yes." Later, in the Opinion for the Plurality, J. Scalia included Footnote 11 referencing my report that draws a distinction between structural fills and other pollutants stating:

> Such scientific analysis is entirely unnecessary, however, to reach the unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an "addition ... to navigable waters," 33 U. S. C. § 1362(12), while the deposit of *stationary* fill material generally is not.

When we first briefed Major General John Wall after he became Director of Civil Works (including Regulatory) at Corps Headquarters, he said that his door was always open to us but to never enter it with a problem unless we already had a solution for the problem. So how can this Congress resolve the dilemma that the 1972 and 1977 Congresses unknowingly caused and has become the Sec 404 program?

First, recognize that 404 discharges are not wasting operations: they are part of a construction effort. Second, I suggest that instead of naming S. 1140 the *Federal Water Quality Protection Act*, name it the *Water Resources Conservation Act* (WRCA). Conservation is defined as *wise use*. The Corps has been the broker of wise use for decades – and only incidentally water quality protection.

Third, the permitting role of Sec 404 should be excised from the CWA and placed into S. 1140 with clear direction that the Secretary of Army administers all aspects of it. Extraction of Section 404 from the CWA would result in no increase in pollutants to navigable waters. EPA can have an advisory role on permit issuance, just as the USFWS, NMFS, Coast Guard, etc have now. The Clean Water Act can continue to define rock,

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[10] http://www.wetlandtraining.dreamhosters.com/wp-content/uploads/2014/07/Technical-Principles-Related-to-Establishing-the-Limits-of-Jurisdiction-for-Section-404-of-the-Clean-Water-%E2%80%93-Robert-J.-Pierce-Ph.D.-PWS-CWD-2003.pdf

sand and cellar dirt as pollutants IF THEY ARE DISCHARGED IN A WASTING OPERATION and EPA can continue to be responsible for the enforcement of all illegal discharges of these pollutants. For example, if someone cut a ditch through a wetland that is determined to be under the jurisdiction of the federal government and sidecasts the dredged material without a permit, EPA would be responsible for the enforcement action of this discharge of dredged material into a resource under federal purview. However, if mom and pop need to discharge structural fill into the same wetland as the foundation for their garage, the Corps would do a public interest review including consideration of NEPA, CZM, Endanger Species, Cultural Resources, the Section 404(b)(1) Guidelines, state 401 water quality certification and consultation with other agencies under Section 404 of the WRCA and determine if the loss of aquatic resource is not contrary to the public interest. If it isn't, then the Corps would issue a Section 404 (of the WRCA) Permit and mom and pop can build their garage.

Finally, the WRCA should NOT provide dual authority to control different aspects of the program as is now in effect with Section 404 in the CWA. Do not perpetuate the poor governance policy of having one Executive agency control fundamental precepts of another Executive agency's program.

Even if my recommendation is adopted and it gives complete control of Section 404 to the Corps, Congress needs to recognize that until it addresses the more fundamental question of the upper limit of federal authority, it will only be shelving the problem for another day. This is an opportunity to resolve by law, the issues that AG Civiletti addressed by opinion in 1979. Be bold and bite the bullet. Reinforce the principles expressed in Section 101(b) of the CWA recognizing the sovereign role of the states and tribes. Earlier Congresses had the fortitude in 1972 to recognize the primary role of the states in water quality (through Section 401 of the CWA) and the commitment to states since at least 1968 for the management and regulation of floodplains. The Corps clearly recognizes the state sovereignty over floodplains (77 FR 10214 – 10283). Even EPA appears to:

> Absolutely no uplands located in "riparian areas" and "floodplains" can ever be waters of the United States subject to jurisdiction of the CWA. [79 FR 22207]

Can there be any doubt that unstabilized dirt wasted onto the upland portion of its floodplain may eventually erode and adversely affect the water quality of the Potomac River as well as perhaps the Chesapeake Bay? It is the states' and local governments' responsibility to ensure that water quality does not suffer from such discharges. Congress needs to compartmentalize responsibilities between the states and the federal government (as it did for floodplains and water quality) for the upper reaches of watercourses where the impact on navigable waters of the U.S. under the Commerce Clause is so tenuous as to not warrant usurpation of states' sovereignty.

I thank you for this opportunity and will be happy to try to answer any questions that you might have.

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June 16, 2015

Senate Committee on Environment and Public Works

United States Senate

Washington, D.C. 20510

Dear Ranking Member Boxer and Chairman Inhofe:

As requested by Senator Fischer in a follow-up question to my testimony on S. 1140 on May 19, 2015, I have reviewed S. 1178 as written as of June 12, 2015. I can state unequivocally that I fully support the fundamental concepts of S. 1178 to study and develop, from technical and policy/legal perspectives, the appropriate "degree of connectivity" sufficient to establish the upper limit of federal jurisdiction over tributaries and other waterbodies within the context of the term *significant nexus*. Beyond simply my support, however, I believe that it is essential that the analyses be done to more clearly define federal navigational servitude and the rights of private individuals and states.

Having now had the opportunity to read the prepublication version (May 27, 2015) of the EPA *Clean Water Rule: Definition of "Waters of the United States"* (Rule) and the extensive preamble to the Rule (Preamble), I find that there are a number of statements and conclusions in them that are very troubling. It is clear to me:

1. From the Preamble of the Rule that EPA has made a very narrow reading of Section 101(b) of the Clean Water Act (Act). Its stated position is that assumption of Section 402 and 404 authorities by States and Tribal Entities fully meets the 1972 Congressional commitment to *recognize, preserve and protect the primary responsibilities and rights of States...*" As a citizen of the State of Maryland, I find it reprehensible that EPA has taken it upon itself to so minimize the responsibilities and rights of the states under the Constitution.
2. From both the Preamble and the revised definition of Waters of the United States that that EPA simply continues its practice since 2007 of assuming that all connections that are more than speculative or insubstantial, are *significant*. The Rule then defines *significant nexus* by using the term *significantly affects* – defining a term using the same term is a matter of poor use of language in any context and especially egregious when it forms the basis for federal oversight of private property and waters of the states. Readers are no further informed on what constitutes *significant nexus* than they were when Justice Kennedy used the undefined term in his Rapanos opinion. Since it has had eight years since June of

2006 when the Rapanos Court decision was released to provide a useful definition of *significant nexus* and hasn't, it appears that it is beyond the capabilities of EPA to do so. Perhaps identifying the upper limit of *insubstantial* would prove an easier task. Even if EPA would promulgate a definition of *insubstantial*, however, it would leave open the fundamental fact that conditions exists between *insubstantial* and *significant*, i.e., there is a category of connection that has substance but is not significant.

3. That the Rule establishes that if a waterbody is connected, then it is significantly connected (no matter how remote or small or infrequent it flows or how great the transmission losses) and if it is not connected then it takes a case-specific significant nexus analysis to demonstrate that it is significantly connected. The combining of isolated resources in certain geographic regions of the country in the Rule at 33 CFR 328.3(a)(7)(i)-(v) essentially negates the Supreme Court Ruling in SWANCC.[1]

4. That a tributary is defined in the Rule as "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark" (OHWM). In 2005, the Corps issued Regulatory Guidance Letter 05-05, which provided a list of 15 characteristics that could identify an OHWM. One of the 15 was "bed and bank." Consistent with this RGL, defining a tributary by requiring bed and bank and OHWM is a redundant requirement. This emphasizes that the term OHWM needs to be redefined and should be a quantitative definition similar to that which was published by EPA on September 5, 1975 [40 FR 41297]. My recommendation is that the period of record average mean annual flow (or similar computed flow) be used to define the OHWM and if that value is too low to routinely measure using standard gauging equipment, then the ephemeral channel is not significantly connected to navigable waters of the U.S. because the ordinary flow can not be forming the water mark, and thus, has no OHWM.

5. From the Preamble that there is the implication if not direct statement that areas with no surface connections are connected by ground water and thus, form a significant nexus to downslope waters as base flow. Unfortunately, what is not clarified is that the ground water that forms base flow downslope is likely, in most catchments, not simply water that was in the same stream further upslope and has resurfaced. In the humid parts of the country, most ground-water recharge occurs in the interstream areas, i.e., all areas except along streams and their adjoining floodplains. In the drier parts of the country, recharge is more complex with most of it occurring in mountain ranges, on alluvial fans that border the mountain ranges, and along the channels of **major** streams...[2] [emphasis added]. Thus, the Rule with its Preamble and Study ignores the fact that most base flows in navigable waters or the U.S. are likely formed from ground water sources not

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[1] Solid Waste Agency of Northern Cook County

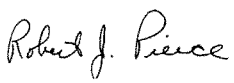
[2] Heath, R. C. 1983. Basic ground-water hydrology. U.S. Geological Survey, Water-Supply Paper 2220, Washington, D.C.

related to the water in the upstream channel that is morphologically connected to the navigable water of the U.S.

6. That the approach identified in the Rule of combining landscape features and evaluating a single feature such as an ephemeral channel over many years, is an approach that is not employed in other aspects of the CWA. Section 401 allows the discharge of pollutants as long as they are below a concentration that represents the discharge of a toxic substance in toxic amounts. Total Maximum Daily Loads (TMDL) set standards that are based upon a single day not several years. Section 402 NPDES uses technology-based and water quality-based approaches to limit pollution – they do not regulate based upon potential concentration over multiple years or multiple sources.
7. That there is absolutely no recognition in the Rule or the study that most land uses in most states are subjected to rigorous stormwater management requirements imposed by local, county and/or state governments. Stormwater is not magically disposed of. It, in most cases, is returned to the natural landscape in volumes and at velocities that the receiving systems are able to handle without deleterious effects. In many locales, the nonfederal requirements are that stormwater and perhaps other waters be recharged into the ground water aquifer (e.g., Maryland, California). Thus, federal oversight is not needed and that Sections 308 and 309 of the CWA provide EPA with the authority to follow discharges of pollutants upslope beyond navigable waters of the U.S. to their source.

As requested by Senator Fischer, I have attached my thoughts on S. 1178 as drafted. I hope that these will further clarify the Bill and add support to the rationale for passing the S. 1178 into law. If I can be of further assistance, please contact me.

Sincerely yours,



Robert J. Pierce, Ph.D.

Comments on Bill S. 1178 (Bill)

Prepared by

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1. Reference is made to:
   a. The prepublication version of the Environmental Protection Agency (EPA) and Corps of Engineers (Corps) *Clean Water Rule: Definition of "Waters of the United States"* that became available on May 27, 2015, (hereafter Rule). EPA and the Corps are hereafter referred to as the Agencies;

   b. The report prepared by EPA's Office of Research and Development entitled Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, (hereafter Report);

2. p.1, lines 4-5. An alternative title for the Bill could be the "Limits of Navigational Reach under the Commerce Clause of the Constitution Act of 2015"

3. p. 2, Lines 9-18. In addition to the "science" discussed in the Report on connectivity and recommendations of EPA's Science Advisory Board, there are numerous places in the Preamble to the Rule that explain that the Rule is also based upon the agencies' technical expertise and **extensive experience** in implementing the Clean Water Act (CWA) of the past four decades. In many aspects, the Rule is based more on the "agencies' experience," often flawed, than actual science to justify the revised definition of waters of the U.S. I submit that the "experience" that the Agencies rely on in the Rule is of very dubious value and more clearly demonstrates EPA's desire to expand geographic and activity-specific jurisdiction beyond the extent intended by the CWA than to work within reasonable boundaries of the Commerce Clause. A few examples of the four decades of *agencies' experience* follow:

   a. On January 10, 1984, Corps HQ issued RGL 84-1, which stated that *de minimus* movement of soil, in and of it self, incidental to removal … nor its deposit is considered to be a Section 404 Discharge. On March 23, 1984, the Corps HQ issued RGL 84-4, which definitively stated that the CWA does not authorize the Corps to regulate dredging in waters of the U.S. It went on to state that *de minimus* discharges occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge. By RGL 85-4, issued by Corps HQ on March 29, 1985, after the Avoyelles court case, reaffirmed RGL 84-1 policy that *de minimus* discharges do not require a Corps permit. In response to EPA actions in the Lower Mississippi Valley, on July 18, 1990, the Corps issued RGL 90-5, changed its position stated in RGL 85-4 and earlier RGLs, and directed it subordinate commands to regulate all mechanized landclearing under Section 404, irrespective of whether the discharge was *de minimus* or not.

   b. On July 23, 1990, the Chief of the Regulatory Branch at USACEHQ responded to a letter from Mr. B.N. Goode (former Chief of the Regulatory Branch at Corps HQ) and stated that excavation of 404 only waters, where the activity does not involve a permanent or temporary

discharge of dredged or fill material into waters of the United States is not regulated. However, by August 25, 1993, the agencies published joint regulations (commonly referred to as the *Tulloch Rule*) that presumed that all mechanized landclearing and digging of ditches had more than incidental fallback (the new term for *de minimus*) unless the proponent could demonstrate to the agencies that it did not. What followed were a number of court cases and appeals initiated by the American Mining Congress that culminated in a June 19, 1998, appellate court decision that the *Tulloch Rule* was illegal. On June 22, 1998, Corps HQ by email instructed Corps Districts to continue to implement the *Tulloch Rule* prompting the Court of Appeals for DC Circuit to issue a court order barring the Agencies from applying or enforcing the *Tulloch Rule*. But the debate did not end there. A final rule was issued in May 1999. Another proposed rule modifying the 1999 rule was issued on August 16, 2000 and finalized in January 2001. This prompted more litigation and more rules. The Agencies continued attempting to circumvent the Court's rulings with deceptively crafted language in the Regulations, which prompted the Judge in the DC District Court to write in his Opinion "That statement, followed by the coy explanation that it 'is not intended to shift any burden' (66 Fed. Reg. at 4575), essentially reflects a degree of official recalcitrance that is unworthy of the Corps." The judge went on to state that the Corps should rewrite that statement and that the agencies cannot require 'project-specific evidence' from projects over which they have no regulatory authority."

c. On July 15, 1985, EPA testifying before the Senate Committee on Environment and Public Works introduced what was to become know as the *Migratory Bird Rule*, which expanded Sec 404 jurisdiction to most isolated waterbodies. The Corps, under the Civilleti Opinion of 1979, implemented the EPA decision that isolated waterbodies that would/could be used by migratory birds were jurisdictional under Section 404 until it was ultimately found to be inconsistent with the CWA in the SWANCC[1] case before the Supreme Court in 2001. In many respects and especially regarding 33 CFR 328.3(a)(7)(i-v), the Rule is simply a codification of the *Migratory Bird Rule*, although couched in terms of protecting navigable waters of the United States. Thus, it is actually contrary to the SWANCC Supreme Court decision

4. p.2, line 23 to p. 3, line 14. This is the real crux of the issue and it is well stated. I would go beyond this, however, and state that the proper longitudinal limits of the Commerce Clause of the Constitution cannot be explained entirely by science. This is acknowledged in the Preamble to the Rule (*The scientific literature does not use the term* "significant nexus" *as it is defined in a legal context...*) and since J. Kennedy and the Court are opining in a legal context, the legal definition also should be evaluated. Scientifically, the whole earth is connected at some level. For example, the Rule erroneously concludes that *Small streams and wetlands are particularly effective at retaining and attenuating floodwaters* (p. 56). While it is true that wetlands may serve this function if appropriately situated, it has long been demonstrated that it is valley storage (i.e., floodplains that may or may not be wetlands) that desynchronize flood flows. If there are wetlands in the floodplain of a stream then they may serve the function. However, most floodplains of most streams are not wetlands and as far back as 1968 (P. L. 90-448), Congress has consistently held that state and local governments, not federal agencies, should have primary responsibility for managing the floodplains within their respective jurisdictions with assistance-only from the Corps, FEMA

[1] Solid Waste Agency of Northern Cook County

and other federal agencies. Loss of floodplain storage capacity can affect river flows. On the Mississippi River for example, navigation can be dramatically affected by activities in the floodplain over which the Agencies have little or no regulatory authority or control. Furthermore, stream channels, especially the smaller headwater streams and wetlands[2] may actually exacerbate flooding by delivering flows to downstream areas faster than if the water traveled overland as sheet flow or infiltrated the land surface and percolated down to the ground water. A wetland saturated to the surface cannot absorb any more water and, thus, may result in saturated overland flow.[3] Nonwetlands, on the other hand, are seldom if ever saturated to the surface and often, unless severely disturbed have higher rates of infiltration than wetlands.

5. p. 3, lines 10 to 14. This paragraph should be reworded to include the policy/legal aspects of any causal connection to navigable waters of the U.S. I suggest that either the responsibilities of and composition of the Panel (as defined in S. 1178) be expanded to include this aspect of *significant nexus* or a parallel panel be constituted to address this issue. In either case, if the Commission (as defined in S. 1178) is going to be the final arbitrator of the longitudinal limits of federal regulatory authority over navigable waters, then it needs to have input on both aspects of the issue.

6. p. 4, line 21 et al. I fully support the establishment of the Supplemental Review Panel (SRP) – although I personally would not have included the term *Supplemental* in its title, since in my opinion, it is the panel that EPA should have convened in the first place to evaluate a study of the concept of *significant* in the context of *significant nexus*, rather than expending time and money studying connectivity (nexus) alone. I suggest that the charter of the SRP be expanded to consider the issues of 1) the upper limit of insubstantial; and 2) whether there is a range of connectivity that has substance (i.e., more than insubstantial) but is not *significant*.

7. p. 8, line 19 et al. I recommend that the duties of the panel be expanded to include both the policy/legal aspects of *significant nexus* as addressed above in Bullet 4 and the term insubstantial as addressed above in Bullet 6.c In addition to "„ duration, magnitude and frequency of flows…" consideration needs to be given to distance from a waterbody to the navigable water of the U.S. Streams are either gaining (increased surface flow with distance) or losing (decreased surface flow with distance) at any point along their length. Some streams will be gaining as they pass through mountains and losing as they flow across plains. Transmission loss (water lost from surface flow as the stream progresses downslope) is a critical element of consideration if the purpose is to assess whether pollutants (especially those heavier than water (rock, sand and cellar dirt) ever reach navigable waters of the U,S,. Especially in the arid west, there are stream channels that flow for only short distances before transmission losses exceed surface volume. The idea that surface water lost into the ground from small, ephemeral channels continues to flow appreciable distances immediately below the surface needs to be better assessed before a conclusion can be reached that such flow represents a connection navigable waters of the U.S. especially when proper consideration is given to the amount of water needed to simply fill pore spaces in drained soils. In many scenarios, it is more likely that water lost in the upslope stretch of a stream never resurfaces

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[2] Carter, V. 1996 Technical Aspects of Wetlands: Wetland Hydrology, Water Quality, and Associated Functions. *In* USGS Water Resources Information, National Water Summary on Wetland Resources. Water Supply Paper 2425

[3] Chapter 9 in Dunne, T. and L.B. Leopold. 1978. *Water in Environmental Planning*. W.H. Freeman And Co., San Francisco. 818+ p.

in a distant lower stretch of the stream but, rather, the flow down stream is actually generated from events in a different portion of the watershed – that is, it is new flow from sources unrelated to upstream flow in any particular channel.

8. p. 9, lines 1-5. I fully support the breadth of the charge expressed in (B).
9. p,. 11, line 7 et al. The Commission (as identified in S. 1178) may be able to serve the role of developing the policy/legal aspects of *significant nexus* as discussed above in Bullet 5, but it is not clear that it does serve that role (p. 16, line 13 et al. on Duties). If the intent is for the Commission to serve the role, then it should be specifically stated. If not then either the Panel or a 2nd panel, specifically convened to address policy/legal aspects of the term *significant nexus,* needs to be charged with doing so. The issue of the longitudinal limits of authority under the CWA cannot be solved by science alone.
10. p. 11, line 16. The membership of the Commission should automatically include the Chairperson of the Panel and if a second panel is convened to address policy/legal aspects, that chairperson as well. It is in the best interest of the Commission to have first-hand deliberations of the Panel(s) and not rely on agency staff or others to convey the breadth of discussion generated by the Panel(s).

Senator SULLIVAN. Thank you, Mr. Pierce.
Professor Parenteau, please.

STATEMENT OF PATRICK PARENTEAU, PROFESSOR OF LAW, SENIOR COUNSEL, ENVIRONMENTAL AND NATURAL RESOURCES LAW CLINIC, VERMONT LAW SCHOOL

Mr. PARENTEAU. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to be here.

I appear here in my own individual capacity. I am not here representing any particular interest. I do have over 40 years of experience with the Clean Water Act.

I served as senior counsel with the Environmental Protection Agency for the New England region for a number of years during the Reagan administration. I was also the head of the Vermont Department of Environmental Conservation with responsibility for implementing the Clean Water Act at the State level. I represented business interests and I represented environmental interests.

I have a 360-degree view of how the Clean Water Act has evolved over the years and how it is currently operating.

With due respect to Senator Barrasso and the sponsors of this bill, my message today is simple and unfortunately, fairly direct. I think this is a bad bill. I think it is based on bad science, bad law and bad policy. I think it is going to make a difficult and unfortunate situation even worse.

I think it is going to confuse what is already a very confused jurisdictional question under the Clean Water Act. It is going to increase conflict and I suppose, from the standpoint of an environmental law professor, some good news is it is certainly going to create jobs for lawyers for a very long time to come, years, if not decades. I say that knowingly.

We are still litigating some of the fundamental questions of the text of the 1972 Act, 45 years after the law passed. It is no exaggeration to say we are looking, if this bill passes, at decades of litigation to try to untangle the difficulties that it is creating.

First, as to the science, the best available science is represented in EPA's Connectivity Study. This was a blue ribbon panel of some of the finest aquatic scientists in the Nation appointed under the auspices of the Scientific Advisory Board, which this body created to oversee EPA's rulemakings.

Their study conclusively shows, on the basis of all the existing literature, some 1,200 peer-reviewed studies, the critical importance of headwater streams and associated wetlands regardless of size, regardless of location on the landscape in an integrated system of water quality maintenance and biological integrity that supports traditionally navigable waters, rivers, lakes and estuaries.

That science is the best science there is. The science is always looking for better science but as of today, that study, which has been rigorously reviewed, represents the best available science.

There is no science that this bill is based on. This bill uses terms that have no grounding in science. The concept of isolated waters, looking at waters in isolation without regard to their interconnection within a system that functions together is not scientific. There are many other problems with terms used in this bill that time does not permit me to discuss but I will refer the subcommittee to

my testimony for more detail. The science is clearly on the side of the approach that EPA is taking.

Second is law. I continually hear that EPA is expanding the scope of Federal jurisdiction under the Clean Water Act. That is flatly wrong. Before SWANCC, before Rapanos, the considered judgment of all the hundreds of courts and hundreds of judges that looked at the question was that the entire tributary system of the Nation's navigable waters was subject to the jurisdiction of the Clean Water Act. That is all the way to the U.S. Supreme Court.

The most outstanding example of this is the United States v. Deaton in the Fourth Circuit that was issued after the SWANCC decision notably in which a very conservative panel, two of which were on President Reagan's short list for the Supreme Court, ruled unequivocally that the Corps had jurisdiction over non-navigable tributaries and associated wetlands. The law, this rule, is reducing dramatically the scope of the jurisdiction that existed prior to these two troublesome decisions.

As to policy, I hear a lot of talk about the States being against this rule. It depends on who you ask in a State. I was in a State that had tension between the agriculture agency and the water quality agency. You get different answers from different agencies depending on the type of question you ask.

When the Rapanos case was before the Supreme Court, over 30 States filed an amicus brief strongly supporting the extension of Federal jurisdiction over non-navigable tributaries and associated wetlands for the simple reason that downstream States are powerless to protect their water quality without the Clean Water Act, powerless.

The U.S. Supreme Court has eliminated Federal common law for water quality. There is no other recourse for a downstream State to protect its water quality other than through the Clean Water Act.

I would be happy to answer your questions.

[The prepared statement of Mr. Parenteau follows:]

United States Senate

Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Legislative Hearing on S. 1140, "The Federal Water Quality Protection Act."

May 19, 2015

Statement of Patrick Parenteau

Professor of Law and Senior Counsel,

Environmental and Natural Resources Law Clinic

Vermont Law School

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to share these views on S.1140, legislation that addresses the foundations of the Clean Water Act (CWA) and that could have profoundly negative consequences for the quality of the nation's waters that are of vital importance to the health of the American people and the productivity of the American economy.

By way of background I have been involved in various ways with the CWA for over forty years. From 1975-1984, while I was with National Wildlife Federation in Washington, I participated in many of the legislative debates, judicial actions, rulemakings, and other administrative proceedings during the formative stages of the Act's programs. During the Reagan Administration in the mid 80's I served as Regional Counsel for EPA's New England regional office with responsibility for overseeing the implementation and enforcement of the CWA in major cases including the cleanup of Boston Harbor. Following that I served as Commissioner of the Vermont Department of Environmental Conservation with responsibility for implementing the CWA at the state level. From there I joined the Perkins Coie law firm in Portland Oregon where I provided advice and representation to business interests on permitting, compliance, enforcement and other regulatory matters. For the past 22 years I have been on the faculty of the Vermont Law School where I teach the CWA, conduct training programs for judges and practitioners, research and publish articles, write amicus briefs in cases before the Supreme Court and other courts, and frequently give presentations and media interviews on the latest developments under the Act. In short I have seen the CWA from a variety of perspectives and am very familiar with the subject matter of today's hearing.

To come straight to the point, and with respect, my message today is simple and direct: S.1140 is a deeply flawed bill that is based on bad science, bad law, and bad policy. It will not resolve the uncertainty and controversy over the geographic scope of the CWA, or help clarify the respective roles of the federal and state governments, or improve the administration of the law. Instead it will make a bad situation worse and spawn yet more conflict, confusion, and litigation that will take years, perhaps decades, to untangle. More importantly it represents a dramatic retreat from the Act's stated objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters." It is reneging on the promise the 92d Congress made to the American people in 1972 that our rivers and lakes would no longer be used as waste receptacles, that there would be no more "pollution havens," no more right to pollute, no more massive fish kills, no more outbreaks of waterborne diseases, no more sludge washing up on the beaches of coastal states. Congress was reacting to decades of failed approaches that relied too heavily on individual state initiatives and voluntary measures to stem the rising tide of pollution fouling our rivers, lakes and coastal waters. The lessons of history should not be forgotten as this bill moves through the legislative process.

Americans care about clean water. More than half believe it is a fundamental right. Ninety one percent are "concerned that America's waterways will not be clean for their children and for their grandchildren."[1] Small businesses also support strong federal controls on water pollution. A poll conducted by the American Sustainable Business Council showed that 80% of small business owners favor federal protection of upstream headwaters and wetlands as proposed in EPA's "Waters of the U.S." rule.[2]

Considerable progress has been made over the past forty five years cleaning up polluted waters due to a strong federal-state partnership that features significant public investment in wastewater treatment systems and a comprehensive regulatory program that protects the interests of downstream states. Yet over forty percent of the nation's waters still do not meet water quality standards that protect human health and aquatic ecosystems. The reason is clear: where sources of pollution are regulated under the Act's comprehensive NPDES permit program administered by the states with active EPA oversight compliance rates are high and harmful pollutants have been reduced dramatically. By contrast where sources of pollution are not subject to regulation—so-called nonpoint sources—voluntary control measures (BMPs) administered by the states with little or no EPA oversight have largely failed to prevent significant impairment of water quality (Chesapeake Bay, Gulf Dead Zone, Lake Erie, Lake Champlain...). The key to success, as Congress recognized in 1972, is to control pollution at the

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[1] Reed Benson, Pollution without Solution: How Impairment Problems Under Clean Water Act Section 303, 24 STAN. ENVTL. L.J. 199, 267 (2005).

[2] New Poll: Small Business Owners Want Strong Clean Water Rules July 23, 2014; http://asbcouncil.org/news/press-release/new-poll-small-business-owners-want-strong-clean-water-rules

source rather than wait for it to reach major water bodies, by which time it is too late to prevent damage to water quality that can prove difficult if not impossible to undo. As a point of emphasis over 40% of the sources, nearly 15,000 facilities, currently regulated under the Act discharge into small or intermittent tributaries located in the headwaters of navigable rivers. Thus it is clear that reducing the scope of the Act reduces protection of water quality across the nation.

A line by line critique of S.1140 is beyond the scope of this testimony but I would like to explain why I believe the bill should not be the vehicle for addressing the very real problems created by the Supreme Court's problematic decisions in the *SWANCC* and *Rapanos* cases.

Bad Science

The bill uses terms that have no scientific grounding. For example it uses the term "isolated" to classify and exclude from protection certain wetlands, ponds and other water bodies. That term has no basis in science.[3] Looking at individual water bodies in isolation is completely unscientific, as the Scientific Advisory Board (SAB), the body created by Congress to independently review EPA regulatory decisions, has found. The SAB generally agreed with EPA's aggregation approach to evaluating the significance of individual wetlands, ponds and streams. Specifically the SAB found that "the scientific literature supports a more definitive statement about the functions of "unidirectional" non-floodplain [i.e. "isolated"] wetlands that sustain the physical, chemical and/or biological integrity of downstream waters."[4]

The bill defines a stream as a "natural channel." This ignores the fact that vast amounts of once natural streams have been channelized, leveed, dammed and altered by human activities. The National Academy of Sciences estimates that "more than 85 percent of the inland water surface area in the United States is artificially controlled. [5] The bill invites metaphysical arguments about what "natural" means in a human dominated landscape. Labels are not important; functions are. Whether a stream is natural or unnatural has no bearing on whether it functions as an integral part of an interconnected hydrologic system.

The bill defines "body of water" to mean a "traditional navigable water, territorial sea, river, stream, lake, pond, or wetlands;" and then excludes "water that is not located within a body of water." This means that manmade tributaries, which have been covered under the Act

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[3] See David M. Mushet, et al, "Geographically isolated wetlands: rethinking a misnomer," USGS, http://dx.doi.org/10.1007/s13157-015-0631-9

[4] SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence; http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537354F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

[5] National Academy of Sciences, "Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy," 4 (1992)

from the beginning, would no longer be jurisdictional even though they may well determine the quality of downstream navigable waters.

The bill adds new terms and concepts that will create more uncertainty and further complicate a process that is already challenging for regulators and the regulated alike. One of these is the requirement to show a "surface hydrologic connection," which confusingly requires a continuous surface connection through which water moves, but allows for situations where water is not always present. Another is the reference to the National Hydrography Dataset maintained by the USGS and the use of a GIS mapping system that uses a map resolution of 1:100.000. The problem is that this resolution generally captures only stream reaches that are longer than a mile in length. There are better maps at higher resolutions that would pick up many more streams worthy of protection. It is generally a bad idea for statutes to codify tools that are constantly being upgraded.

The bill talks about protecting a stream reach that "contributes flow in a normal year of sufficient volume, duration and frequency that pollutants in that reach would degrade the quality of the traditionally navigable water." Beyond the difficulty of determining what constitutes a "normal year" in any given location in the country—especially given the impact of climate change on regional precipitation patterns-- pollutant transport is only one and not even the most important function of tributary streams. The science shows that headwater streams and associated wetlands provide many important water quality and ecosystem functions. They provide spawning habitat and nutrients for downstream fisheries; they store water to reduce erosion and flood damage downstream; they release water during dry periods to maintain flows in navigable water. In short they provide a myriad of ecosystem services of benefit for humans, for free.

The bill seeks to exclude things like stormwater systems, but ignores the fact that some are in fact navigable waters. A prime example is the Los Angeles River, a portion of which, made famous in the "Terminator" movies, is anything but "natural." It is lined with concrete and functions as a major flood control and stormwater management system for LA County. Yet it still functions as a river and is used by Chinook salmon migrating upstream to remnant spawning habitat. Point being the world is a complicated place that cannot be simplified by legislative fiat.

In contrast to the weak scientific foundation on which this bill is based, EPA's proposed rule is solidly grounded in the latest watershed science. EPA's assessment ("Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence") is based on more than 1,200 pieces of previously peer-reviewed and publicly available literature. The science unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence water

quality and ecological integrity of navigable waters. This report was rigorously reviewed and critiqued by a blue ribbon panel of experts under the auspices of the SAB.[6] The SAB strongly endorsed EPA's major conclusions:

> *The SAB finds that the review and synthesis of the literature describing connectivity of streams to downstream waters reflects the pertinent literature and is well grounded in current science. The literature review provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters*

Bad Law

The bill states that "the Federal Water Pollution Control Act is an Act to protect traditional navigable waters from water pollution." This badly mischaracterizes the original intent, purpose, structure, history and judicial interpretations of the 1972 law. As the Conference Report explained, Congress deliberately removed the word "navigable" from the term "waters of the Unites States" in order that the term would "be given the broadest possible constitutional interpretation."[7] The Act has never been interpreted to protect only traditionally navigable waters. In *Train v. City of New York*, 420 U. S. 35, 37 (1975) the Court described the 1972 amendments as establishing "a comprehensive program for controlling and abating water pollution," rejecting the notion that the purpose of the Act was to protect navigation. The Supreme Court has ruled on a number of occasions, including in *SWANCC* and *Rapanos*, that the Act is not limited to traditionally navigable waters. In *Rapanos* Justice Scalia said "We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional meaning of that term." In *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, (1985) the Court said the interests served by the statute embrace the protection of "'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites'" for various species of aquatic wildlife. There is simply no legal support for the statement that the purpose of the Act is confined to protecting traditionally navigable waters.

The premise of the bill is that EPA's proposed rule "expands" the scope of federal jurisdiction beyond what existed prior to the *SWANCC* and *Rapanos* decisions. This misstates the law. Prior to these decisions the federal courts, including the Supreme Court, adopted a broad interpretation of the geographic scope of the Act that included intermittent and artificial

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[6] A list of the members of the panel can be found here: http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubCommittees/Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report

[7] S. Conf. Rep. No. 92–1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327

tributaries and their adjacent wetlands.[8] Perhaps the most definitive statement came in *United States v Deaton* 332 F.3d 698 (4th Cir. 2003)where the Fourth Circuit, in a post *SWANCC* decision, upheld the Corps' assertion of jurisdiction over a wetland adjacent to a road side ditch 20 miles from the nearest navigable water. Writing for a unanimous panel Judge Michel said:

> *In sum, the Corps's regulatory interpretation of the term "waters of the United States" as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.* Id at 708

The bill misreads the *Rapanos* decision and the cases that have interpreted it. The bill rejects the "significant nexus" test articulated by Justice Kennedy in his concurring opinion. Yet every Circuit Court that has interpreted *Rapanos* has adopted the significant nexus test as either the controlling or the exclusive test to be applied in jurisdictional determinations.[9] Some courts have ruled that waters may be considered jurisdictional if they meet either the Kennedy test or Justice Scalia's plurality opinion, but no court has ruled that Justice Scalia's opinion is controlling. Yet the bill seems to be based primarily on Justice Scalia's opinion, and even then it fails to incorporate Justice Scalia's acknowledgement that "seasonal" tributaries (whatever they may be) can be jurisdictional.

But the larger point is that a majority of the justices of the Supreme Court would support waters that meet either the Kennedy or the Scalia test. EPA chose to base its proposed rule on the Kennedy test because all of the Circuit Courts that have addressed the question would uphold this approach. On the other hand there is no support in either the fractured opinions in *Rapanos* or in the Circuit Court decisions that have sought to reconcile them for the approach taken in S. 1140. Importantly, the bill does not overrule any of these decisions. The lower courts will continue to look to these decisions for guidance and for precedential effect.

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[8] See William L. Andreen, The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II, 22 STAN. ENVTL. L.J. 215, 286 (2003).

[9] *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), cert denied _U.S._ (2007) (either Plurality or Kennedy standard); Cordiano v. Metacon Gun Club, Inc. 575 F.3d 199 (2d Cir.2009)(significant nexus); *U.S. v. Donovan* 661 F.3d 174 (3d Cir.2011); *Precon Dev. v Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011)(Kennedy test); *United States v. Lucas*, 516 F.3d 316, 326 (5th Cir. 2008) (satisfied plurality; no need to consider Kennedy); United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (either plurality or Kennedy); *United States v Gerke*, 464 F.3d 723 (7th Cir 2006), cert. denied _U.S._ 2007 (Kennedy); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (either standard); *Northern California River Watch v City of Healdsburg*, 496 F.3d 993 (9th Cir 2007)(Kennedy test satisfied); *United States v Robison*, 505 F.3d 1208 (11th Cir 2007)(only Kennedy)

This bill will simply add more layers of analysis and complexity, providing more ammunition for those seeking to challenge results they don't like, and creating even more inconsistency in the way the law is administered in different parts of the country with radically different climatic and hydrological conditions. Any time new words and concepts are added to a statute there will be disagreement and litigation over their meaning and effect in situations that cannot be foreseen. This bill is loaded with such ambiguities and is a recipe for chaos.

Bad Policy

In addition to making matters worse the bill will impede efforts to achieve the Act's goals of restoring and maintaining water quality, conserving important biological resources and protecting the sources of public water supplies. Nearly 60 percent of streams nationwide that contribute to the drinking water supply for 117 million Americans are headwater streams and/or streams that do not flow year round. In the continental U.S., 357,404 total miles of streams provide water for public drinking water systems. Of that total, 58% (207,476 miles) are intermittent, ephemeral, or headwater streams.[10]

The bill assumes that there is great opposition to EPA's proposed rule among the states. Yet in the *Rapanos* case over thirty states filed amicus briefs supporting the Corps and EPA and opposing efforts to roll back the federal jurisdiction over small streams and adjacent wetlands. It is instructive to quote at length from their brief:

> *Federal regulation is particularly important because discharges into non-navigable tributaries or their adjacent wetlands in one State often affect the waters of a downstream State. Without federal standards, the downstream State would find itself significantly hampered in protecting its own water quality and preventing harmful fluctuations in water quantity.*
>
> *It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect — often the dominant effect — on water quality and quantity. Furthermore, a case-by-case approach would be inherently unpredictable, costly, and immensely burdensome both for public agencies and for property owners needing permits from them.*[11]

The bill also assumes that if federal jurisdiction is removed the states will simply fill the gap. History suggests otherwise. In a 50 state study the Environmental Law Institute found:

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[10] EPA Drinking Water Map http://water.epa.gov/type/rsl/drinkingwatermap.cfm

[11] *Rapanos v United States*, Nos. 04-1034, 04-1384, Amicus Brief of the State of New York et al http://www.eswr.com/docs/1105/rapanos/rapamicstates.pdf

Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act. These restrictions take the form of absolute or qualified prohibitions that require state law to be "no more stringent than" federal law; property rights limitations; or a combination of the two. Such provisions constrain, and in some instances eliminate, the authority of state or local regulators to protect aquatic resources whose Clean Water Act coverage has disappeared or been rendered uncertain.[12]

In sum, there is no merit to the suggestion that states will be in a position to fill the gaps and protect their water quality from pollution sources outside their borders.

Conclusion

There is no need to act in haste. The final Waters of the U.S. rule has been sent to the White House for review and is expected to be released any day. There will be time enough to dissect the rule and identify whatever specific shortcomings warrant legislative action with surgical precision as opposed to the blunt approach of this bill. This rulemaking has been years in the making. It has gone through an extensive public process that has generated over 1 million comments; the vast majority of which support the rule. EPA and the Corps conducted over 400 meetings across the country and consulted with state and local officials, stakeholders, regulated entities including small businesses, and interested members of the public. The rule has been through a rigorous economic analysis under the regulatory impact analysis mandated by Executive Orders 13563 and 12866. Adding still more layers of review and analysis will be costly and time consuming not just for the federal agencies but for all of the stakeholders and others who have participated in a process that has been ongoing for the past nine years, ever since the Supreme Court created all this confusion with its fractured decision in *Rapanos*. There comes a point at which further process does not help clarify anything, but only serves to further muddy the waters and prolong the conflict. In my view we are at that point. I would urge the subcommittee to table this bill and give EPA's rule a chance to work.

Thank you.

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[12] State Constraints: State Imposed Limitations on Authority of Agencies to Regulate Waters beyond the Scope of the Clean Water Act (2013); http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

United States Senate Committee on Environment and Public Works
May 19, 2015 Hearing entitled,
"Legislative Hearing on S. 1140, The Federal Water Quality Protection Act."

Questions for the Record to Professor Patrick Parenteau

Ranking Member Senator Boxer:

1 Does S. 1140 represent a departure from the way the Clean Water Act has been interpreted and applied by the courts over the past four decades?

Response: Yes, prior to the *SWANCC* and *Rapanos* cases the courts, including the Supreme Court in *Riverside Bayview*, had upheld the application of the CWA to a broad range of "waters of the US" including headwater streams, intermittent and artificial tributaries, arroyos, and wetlands adjacent to both navigable and non-navigable waters. In fact before *SWANCC* no court had ever ruled against the assertion of federal jurisdiction over the "entire tributary system of the navigable waters."[1] *SWANCC* was an anomaly involving an abandoned sand and gravel pit that was "isolated, intrastate and non-navigable." The Court said the Corps could not regulate these "isolated waters" based solely on use by migratory birds. But subsequent cases ruled that *SWANCC* was confined to its unique facts and did not establish any sweeping new precedent. In the over 70 cased decided after *SWANCC* the scope of the Act remained largely what it was before *SWANCC*. Similarly the fractured decision in *Rapanos* (4-1-4) failed to produce a binding precedent and has not resulted in any major reduction in the scope of the CWA. As mentioned in my written statement there have been seven Circuit Court decisions since *Rapanos* and all have reached the conclusion that Justice Kennedy's "significant nexus" test is either the controlling or exclusive test for determining what constitutes a WOUS. To date the lower courts are continuing to find federal jurisdiction in nearly every case where it has been challenged.

2. How would S. 1140 affect the ability of downstream states to protect their water quality?

Response: S. 1140 would impede downstream states ability to protect their water quality and beneficial uses by removing the protections of the Clean Water Act for many of the streams and wetlands that determine the quality of interstate rivers, lakes and estuaries. The Supreme Court has held that downstream states have no power to block permits for

[1] Cf *United States v Deaton*, 332 F.3d 698, 708 (4th Cir. 2003):

upstream discharges even where they are damaging the downstream state's water quality.[2] In an earlier case the Court held that the Clean Water Act "displaced' federal common law in the area of water pollution control, leaving downstream states with the sole recourse of requesting intervention by EPA to protect their water quality.[3]

3. How many states have laws that would prevent them from filling any jurisdictional gaps created by S. 1140?

Response: According to a 50 state study by the Environmental Law Institute:

> "Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act. These restrictions take the form of absolute or qualified prohibitions that require state law to be "no more stringent than" federal law; property rights limitations; or a combination of the two. Such provisions constrain, and in some instances eliminate, the authority of state or local regulators to protect aquatic resources whose Clean Water Act coverage has disappeared or been rendered uncertain."[4]

Some of these laws are very restrictive. For example an Idaho statute provides that it is the "intent of the legislature" that the rules adopted by the state environmental agency in the water pollution control area "...not impose requirements beyond those of the federal clean water act." Idaho Code 39-3601. Even if the state law does not outright prohibit more stringent state laws they may impose procedural barriers. For example, Maine requires the state DEP to identify rules that are more stringent and to justify them, and provides for a longer review period. 38 Maine Rev. Stat. Ann. 341-D. Florida has a similar provision, and further requires approval by the governor and cabinet after review of a cost benefit analysis. Fla. Stat. 403.061(7)(31), 403.804(2). Pennsylvania has a similar requirement under Executive Order 1996-1, requiring a "compelling and articulable" Pennsylvania interest in the deviation or an independent state legislative justification. Maryland has similar provisions in an Executive Order, as does Wisconsin under a Natural Resources Board Policy. Board Pol. 1.52(3). Utah has enacted a similar legislative requirement. Utah Code Ann. 19-5-195. Ohio requires more disclosure and review for such regulatory proposals, including more disclosure for proposed legislation that may be more stringent than federal requirements. Ohio Rev. Stat. 121.39.

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[2] *Arkansas v. Oklahoma*, 503 U.S. 91 (1992)("Affected States may not block a permit, but must apply to the EPA Administrator, who may disapprove a plan if he concludes that the discharge will have an undue impact on interstate waters.")

[3] *City of Milwaukee v Illinois*, 451 U.S. 304,306 (1981)("As contemplated by Congress, the problem of effluent limitations for discharges from petitioners' treatment plants has been thoroughly addressed through the administrative scheme established by Congress, and thus there is no basis for a federal court, by reference to federal common law, to impose more stringent limitations.")

[4] State Constraints: "State Imposed Limitations on Authority of Agencies to Regulate Waters beyond the Scope of the Clean Water Act," (2013); available at http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

4. Would S. 1140 create more or less certainty about the scope of federal jurisdiction under the CWA?

Response: It will create less certainty because it introduces new, uncertain, and unscientific terms into the law like "natural channels," "isolated waters," and "surface hydrologic connection," which confusingly requires a continuous surface connection through which water moves, but allows for water not to be always present. It also creates confusion about how much discretion the agencies would have in implementing the law. It says that rules are invalid unless they adhere to certain principles, but then the core principles (contained in §§ 4(b)(2) & (3) of the bill) do not impose clear commands but employ vague terminology like "should include" and "should not include," as opposed to "shall include" and "shall not include." This will invite litigation to resolve procedural questions of whether the agency has crossed all the T's and dotted all the I's, further prolonging a final resolution of the jurisdictional issues that have been in limbo for almost ten years. The bill requires use of a specific USGS dataset that is already obsolete (see response below).

5. Please elaborate on the statement in your written testimony that S. 1140, "will not resolve the uncertainty and controversy over the geographic scope of the CWA, or help clarify the respective roles of the federal and state governments, or improve the administration of the law. Instead it will make a bad situation worse and spawn yet more conflict, confusion, and litigation that will take years, perhaps decades, to untangle."

a. Specifically, please explain how and why the Sec. 4(a) invalidation of "a revision to or guidance on a regulatory definition of the term 'navigable waters' or 'waters of the United States' issued after February 4, 2015" will fail to clarify the scope of the CWA and the respective roles of federal and state governments, and lead to more conflict, confusion, and litigation.

Response: This language is intended to nullify EPA's proposed Clean Water Rule (which has now been finalized and is due to be published in the Federal Register in the near future). As mentioned, it has taken nearly a decade to produce this rule. Two different administrations have tried to resolve the uncertainty created by the Supreme Court cases through guidance that has proven ineffective. In *Rapanos* Chief Justice Roberts pointedly called upon the agencies to write a new rule to better define the limits of federal jurisdiction under the CWA. Three other Justices have called for a rulemaking. EPA has been engaged in this rulemaking for over a year. EPA has conducted over 400 meetings across the country, received over a million comments and consulted with stakeholders, NGO's, and state, local and tribal officials. The science underlying this rule has been thoroughly vetted through the Scientific Advisory Board. All of this intense public outreach and analysis will be wasted if S. 1140 becomes the law and the agencies are

forced to go back to square one. A whole new rulemaking will require substantial expenditure of time and resources for everyone involved not just EPA and the Corps. And there is no reason to believe that the final outcome will be all that different from where things stand now, except that the uncertainty will continue for at least another year or more. There may be a new administration in power but the science and policy reasons for broad federal jurisdiction are not going to change.

b. Please provide some examples of S.1140 provisions that add additional uncertainty and "will make a bad situation worse and spawn yet more conflict, confusion, and litigation that will take years, perhaps decades, to untangle."

Response: see response to #4 above.

6. Please elaborate on the statement in your written testimony that S. 1140 "represents a dramatic retreat from the Act's stated objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters." Specifically, please provide examples of S. 1140 provisions that are inconsistent with the letter and intent of the Clean Water Act.

Response: The science shows conclusively that headwater streams and associated wetlands are critically important to the chemical physical and biological integrity of watersheds. The Supreme Court in its unanimous 1985 decision in *Riverside Bayview* recognized this fact and held that Congress intended to protect these resources in the 1972 CWA. A.1140 seeks to exempt waters without apparent understanding of the potential scope of such exemptions. A few examples:

(a) If a pond is "isolated" because it does not have a connection to some traditionally navigable water, can it be protected if it is itself navigable or interstate? Can the Great Salt Lake be covered?

(b) The bill says the rule "should not include ... water for agricultural or silvicultural purposes ... at an agricultural or silvicultural facility." Does this mean that if a river is used for irrigation anywhere along its length, is the river supposed to be excluded? If water is used in a timber mill does that mean watershed is excluded?

(c) The bill tries to exclude things like stormwater systems, but ignores the fact that some stormwater networks contain unquestioned waters, including once-natural streams that have been channelized

7. Your testimony provides several examples of how S. 1140 is "based on bad science," including but not limited to, reliance on the National Hydrography Dataset maintained by the USGS and the use of a GIS mapping system that uses a map resolution of 1:100,000 to identify streams covered by the CWA.

a. Please elaborate on how and why this very specific provision is scientifically flawed, would remove protections for important streams, and undermines the Clean Water Act and its goals

Response: This dataset only picks up streams that are more than a mile in length which is an arbitrary cutoff that excludes many streams that perform many essential functions for water quality and biological integrity. It is also only one snapshot of the data that existed at a particular point in time. The USGS dataset is only one tool in watershed management. It is generally a bad idea to codify a single tool as the measure of federal jurisdiction over a subject as complex as water quality.

b. Please contrast the bill's flawed approach limiting streams to those on these specific maps with the science-based treatment of tributaries in the final rule defining "waters of the U.S."

Response: In contrast to the flawed methodology in S. 1140 the final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency, and flow in such tributaries to traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. Further, the rule only covers as tributaries those waters that science shows provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard as required by Justice Kennedy's controlling opinion in *Rapanos*. The agencies identify these functions in the definition of "significant nexus" at paragraph (c)(5). Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule explicitly excludes from the definition of "waters of the United States" erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark. This is a major change from previous regulations and provides the clarity that many have sought.

Senator Gillibrand:

Dr. Parenteau, the EPA estimates that 117 million Americans – more than one third of the US population - get some or all of their drinking water from public drinking water systems that rely in part on intermittent, ephemeral, or headwater streams.

This is even more so in New York, where it is estimated that 97% of our population is dependent on such public drinking water systems. Under this proposed bill, it is my understanding that many of these streams would be excluded from protection under the Clean Water Act, and could only be added if it is shown that each individual stream has the capacity to pollute traditionally defined navigable waters. Estimates suggest that there are 5,728 miles of streams that could fall into this category and would need to be examined.

1. Given those statistics, would the "Federal Water Quality Protection Act" improve or impair the ability of the EPA to ensure that the drinking waters sources that my constituents rely on are safe from harmful pollution?

Response: This bill will significantly impair the authority of federal pollution control officials to protect surface waters around the country and in New York, including sources of drinking water. It would make it more difficult to protect tributary streams and nearby waters, which supply and filter water used for drinking water supply. Furthermore, it would eviscerate the authority to protect features misleadingly called "isolated" waters, which perform many important functions, including recharging groundwater that can be used as a drinking water supply. As you may know, New York City commented in strong support of the proposed rule, in large part because of its linkage to drinking water. The City's comments bear quoting at length:

> "The City generally supports broad federal jurisdiction over streams and wetlands, the protection of which is critical to maintaining the high quality of the City's water supply as well as important natural resources within the City and the State of New York. The City applauds EPA and the Corps for undertaking this important clarification through the rulemaking process.
>
> "The New York City Department of Environmental Protection ("DEP") supplies unfiltered drinking water from 19 reservoirs to 9 million residents of New York State, including 8.4 million residents of New York City. The New York City Watershed feeding these reservoirs spans over a million acres and includes portions both east and west of the Hudson River. New York City's reservoirs are fed by largely non-navigable tributaries in the upper reaches of the Croton, Delaware, and Neversink Rivers and the Esopus, Rondout, and Schoharie Creeks, In fact, approximately 36% of the approximately 3,800 miles of tributaries in the National Wetlands Inventory ("NWI") for the New York City Watershed are mapped as intermittent features. Approximately 25% of NWI wetlands in the East

of Hudson and 40% of wetlands in the West of Hudson portions of the New York City Watershed are estimated to lack permanent connections to downstream waters. DEP has demonstrated the connectivity of adjacent wetlands to downstream waters through its reference wetland monitoring program in the New York City Watershed, where significant baseflow support and carbon outflow were measured from wetlands adjacent to both relatively permanent and intermittent tributaries.

"Because of the significant role of wetlands in maintaining and improving water quality, protecting these source areas is crucial for New York City's unfiltered water supply, The City is also concerned with protecting wetlands within the City, both as important natural resources and for flood mitigation, wave attenuation, and water quality protection."[5]

2. In the absence of federal Clean Water Act jurisdiction over intermittent, ephemeral, or headwater streams that connect to navigable waters, do you anticipate that all states will step into the void and ensure that these waters are protected from pollution?

Response: No. According to an independent analysis by the Environmental Law Institute found that "[o]ver two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act. These restrictions take the form of absolute or qualified prohibitions that require state law to be 'no more stringent than' federal law; property rights limitations; or a combination of the two. Such provisions constrain, and in some instances eliminate, the authority of state or local regulators to protect aquatic resources whose Clean Water Act coverage has disappeared or been rendered uncertain...."[6] In addition to legal constraints, fiscal hurdles to protecting these waters exist; in the most recent Supreme Court case addressing which waters qualify for federal protection, more than 30 States submitted a brief in support of the Bush administration's position that non-navigable tributaries and adjacent wetlands were protected waters, and one of the main reasons they cited was that "the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly. The States already play a vital role in administering parts of the

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[5] Letter from Devon Goodrich, Environmental Law Division, New York City Law Department to EPA Water Docket (Nov. 13, 2014), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-15065

[6] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 1 (May 2013), available at http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters#

Clean Water Act, but they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries."[7]

3. What effect would the Federal Water Quality Protection Act have on water quality in "downstream" states, which have drinking water sources downstream from headwater streams in other states?

Response: Compared to the new Clean Water Rule, the bill would undermine water quality protections to the detriment of water bodies in downstream states. Because the bill would deny protection for certain waters the rule would authorize to be protected, and because the bill would erect significant hurdles to protecting waters for which the rule guarantees protection, it would make it easier to destroy or pollute water bodies that feed into, or filter pollution above, downstream waters, including those in other states. The Supreme Court has held that downstream states have no power to block permits for upstream discharges even where they are damaging the downstream state's water quality.[8] In an earlier case the Court held that the Clean Water Act "displaced' federal common law in the area of water pollution control, leaving downstream states with the sole recourse of requesting intervention by EPA to protect their water quality.[9]

4. Given your more than forty years of experience working in various ways with the Clean Water Act, is it your view that the proposed rule would expand the scope of EPA jurisdiction beyond what has historically been covered under the Clean Water Act?

Response: No. Prior to the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001), the scope of the federal Act was understood to be very broad and policies implemented by administrations of both parties followed this approach. The Clean Water Rule adopted by the administration would cover fewer waters than that traditional interpretation. The limits on federal authority included in the final rule fully respect the Supreme Court's

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[7] Brief of the State of New York et al., Rapanos v. United States, 547 U.S. 715 (2006), at 3, available at http://www.eswr.com/docs/1105/rapanos/rapamicstates.pdf See also Jon Devine et al., The Intended Scope of Clean Water Act Jurisdiction, 41 Envtl. L. Rep. News & Analysis 11118 (Dec. 2011).

[8] *Arkansas v. Oklahoma*, 503 U.S. 91 (1992)("Affected States may not block a permit, but must apply to the EPA Administrator, who may disapprove a plan if he concludes that the discharge will have an undue impact on interstate waters.")

[9] *City of Milwaukee v Illinois*, 451 U.S. 304,306 (1981)("As contemplated by Congress, the problem of effluent limitations for discharges from petitioners' treatment plants has been thoroughly addressed through the administrative scheme established by Congress, and thus there is no basis for a federal court, by reference to federal common law, to impose more stringent limitations.")

decisions; indeed, I believe the final rule represents a conservative exercise of agency authority under the Clean Water Act, as the law has been interpreted by the Supreme Court.

Senator SULLIVAN. Thank you, Professor Parenteau.
Mr. Lemley, please.

STATEMENT OF ANDREW LEMLEY, GOVERNMENT AFFAIRS REPRESENTATIVE, NEW BELGIUM BREWING COMPANY

Mr. LEMLEY. Thank you, Chairman Sullivan, Ranking Member Whitehouse, and members of the committee.

My name is Andrew Lemley. It is an honor and a privilege to be before you today representing my 630 co-workers and fellow employee owners of New Belgium Brewing Company in Fort Collins, Colorado and Asheville, North Carolina.

I am here today for one reason and to deliver one message, which is that our brewery and our communities depend on clean water. Beer, after all, is over 90 percent water. If something happens to our source of water, the negative effect on our business is almost unthinkable.

Colorado breweries in 2013 contributed $249 million in direct value to our economy and provided more than 5,000 jobs. Each of our fellow brewers is equally dependent on a clean, reliable water supply.

Nationally, there are more than 3,400 craft breweries directly employing over 110,000 people. These jobs cannot be outsourced and they range from production technicians to brewers to microbiologists and chemists to sales and marketing, human resources, sales and marketing professionals and everything in between. These are good jobs at growing companies.

We rely on responsible regulations that limit pollution and protect water at its source for our growth. Our journey in crafting world class beers and running a successful business shows that we depend on these regulations.

Over the past 23 years we have learned that when smart regulation exists for all and when clean water is available for everyone, business thrives. We have grown from the basement of our cofounders house in Fort Collins, Colorado to our 900,000-barrel-per-year brewery in Fort Collins. We are also in the midst of building a new 500,000 barrel brewery in Asheville, North Carolina.

We have been able to grow from 2 to over 630 co-workers in part due to the protections that the EPA and Army Corps of Engineers guarantee for our water supply. Clarity in regulation and the protection of natural resources are keys to economic development. That is why we support the proposed Clean Water Rule from EPA.

It will restore clear safeguards against unregulated pollution and destruction for nearly 2 million miles of streams and tens of millions of acres of wetlands in the continental U.S. Bringing these streams and wetlands under the umbrella of the Clean Water Act will help protect the drinking water for one in three Americans.

These water bodies do more than just that. In addition to supplying drinking water, these are the streams and wetlands that communities rely on to prevent flooding, filter pollution, and provide critical fish and wildlife habitat. They provide these valuable services for free.

In fact, the cost-benefit analysis done for the Clean Water Rule estimates that it would generate between $388 million and $514 million per year in economic benefits, far exceeding expected costs.

That is one of the reasons the American Sustainable Business Council so strongly supports it.

As Ranking Member Whitehouse mentioned, ASBC released a poll recently that showed that over 80 percent of small business owners favor Federal rules to protect upstream headwaters as proposed in the Clean Water Rule. I should also note that New Belgium is a member of the American Sustainable Business Council.

More than 1 million Americans submitted comments on the draft rule, with an estimated 87 percent in support. New Belgium submitted supportive comments, as did many of our brewer partners, along with sportsmen, religious leaders, public health advocates and environmental organizations.

I understand there have been many claims about what the Clean Water Rule will and will not do, especially when it comes to agriculture. It was our great honor to host EPA Administrator Gina McCarthy recently at our Craft Brewers Conference in Portland, our industry's annual gathering. More than 11,000 brewers and suppliers attended.

Administrator McCarthy was very clear that nothing in the Clean Water Rule changes the exemptions and exclusions agricultural producers have received since the Clean Water Act was passed in 1972. She assured the brewers in attendance that nothing would change for their agricultural producers after the Clean Water Rule is finalized.

That is critically important to us, because while beer may be 90 percent water, it is our agricultural partners who provide the raw materials that supply everything else, from barley and hops to spices, fruits and other ingredients.

We believe in being a good neighbor because we know that our success is intrinsically linked to the success of our agricultural partners, beer lovers and fellow brewers. Just as we are connected to our neighbors, science shows how small streams and wetlands are linked to downstream water quality.

The EPA and Army Corps of Engineers proposed Waters of the U.S. Rule is extensively vetted and has taken a significant amount of time to develop. To stop the process at this point after the agencies have engaged in an extensive and transparent process to elicit stakeholder input would be an unnecessary delay in the finalization of the rule.

S. 1140 would continue the current state of confusion around Clean Water Act jurisdiction and would leave our waterways open to risk for pollution and destruction while requiring EPA and the Army Corps of Engineers to do what they have already ably and thoroughly accomplished.

Thank you.

[The prepared statement of Mr. Lemley follows:]

U.S. Senate Environment and Public Works Fisheries, Water and Wildlife Subcommittee

May 19, 2015

Chairman Sullivan, ranking member Whitehouse, members of the committee: my name is Andrew Lemley; it is an honor and a privilege to be here today representing my 630 co-workers and fellow employee owners of New Belgium Brewing Company in Fort Collins, Colorado and Asheville, North Carolina.

I'm here today for one reason: our brewery -- and our communities -- depend on clean water. Beer, after all, is 90% water. If something happens to our source of water, the negative effect on our business is almost unthinkable. Colorado breweries contribute $249 million in direct value added in 2013 to our economy every year and provide more than 5,000 jobs – and each of our fellow brewers is equally dependent on a clean, reliable water supply. Nationally, there are more than 3,400 craft breweries directly employing 110,000 people. These jobs cannot be outsourced and they range from production technicians to brewers to microbiologists and chemists to sales and marketing, human resources and everything in between. These are good jobs at growing companies. We rely on responsible regulations that limit pollution and protect water at its source for our growth.

Our journey in crafting world class beers and running a successful business shows just that. Over the past 23 years we've learned that when smart regulation exists for all - and when clean water is available for all -- business thrives. We've grown from the basement of our co-founders' house in Fort Collins to our 900,000 barrel per year brewery in Fort Collins, Colorado. We're also building a new 500,000 barrel brewery in Asheville North Carolina. We have been able to grow from 2 to over 630 co-workers in part due to the protections that the EPA and Army Corps of Engineers guarantee for our water supply.

Clarity in regulation and the protection of natural resources are keys to economic development.

That's why we support the Clean Water Rule. It will restore clear safeguards against unregulated pollution and destruction for nearly two million miles of streams and tens of millions of acres of wetlands in the continental U.S. Bringing these streams and wetlands under the umbrella of the Clean Water Act will help protect the drinking water for 1 in 3 Americans, or more than 117 million people.

These water bodies do double and even triple duty – in addition to supplying drinking water, these are the streams and wetlands that communities rely on to prevent flooding, filter pollution, and provide critical fish and wildlife habitat. What's more, they provide these valuable services for free. In fact, the cost-benefit analysis done for the Clean Water Rule estimates that it would generate between $388 million and $514 million per year in economic benefits, far exceeding expected costs ($162 to $278 million annually). That's one of the reasons the American Sustainable Business Council so strongly supports it - they released a poll last year that found more than 80 percent of small business owners favor federal rules to protect upstream headwaters as proposed in the Clean Water I should note that New Belgium Brewing Company is a member of the American Sustainable Business Council.

More than one million Americans submitted comments on the draft rule, with an estimated 87 percent in support. New Belgium submitted supportive comments, as did many of our brewer partners, along with sportsmen, religious leaders, public health advocates and environmental organizations.

I understand there have been many claims about what the Clean Water Rule will and will not do, especially when it comes to agriculture. EPA Administrator Gina McCarthy recently became the first Cabinet-level official to speak at the Craft Brewers Conference, our industry's annual gathering; this year, more than 11,000 brewers and our suppliers attended. Administrator McCarthy was very clear that nothing in the Clean Water Rule changes the exemptions and exclusions agricultural producers have received since the Clean Water Act was passed in 1972. She assured the brewers in attendance that nothing would change for their agricultural producers after the Clean Water Rule is finalized.

That's critically important to us, because while beer may be 90 percent water, it's our agricultural partners who provide the raw materials that supply everything else: from barley and hops to spices, fruits and other ingredients. Beers like our own Abbey Ale showcase the malty backbone of a Belgian style dubble while hop forward India Pale Ales like Ranger highlight any key ingredient: hops. The ingredients in addition to water that go into crafting a great beer require a clean and abundant water supply as well.

At New Belgium Brewing, we have a triple bottom line business model. We focus on crafting world class beers, caring for the planet and doing what is right for people. Our journey has led us to take innovative steps to reduce our own impact on our water supply. We've built an onsite process wastewater treatment plant. We've cut water use. We give philanthropic dollars to nonprofits engaged in water conservation. In 2014 we gave grants to 39 groups engaged in water conservation and restoration activities. We do what we can to honor the environment in our own process. We advocate for sound policies, like the Clean Water Rule. We give dollars directly to nonprofit organizations doing the work to clean up our rivers, lakes and streams.

We believe in being a good neighbor because we know that our success is intrinsically linked to the success of our agricultural partners, beer lovers, and fellow brewers. Just as we are connected to our neighbors, science shows how small streams and wetlands are linked to downstream water quality. EPA reviewed more than 1,200 scientific publications demonstrating that the health of small streams and wetlands is critically related to downstream water quality.

Protecting our natural resources, minimizing our impact and being a good neighbor are all part of what we strive to do every day in our operations at New Belgium Brewing. The Clean Water Rule will make it easier for us to do all three.

I thank you for your time today.

United States Senate Committee on Environment and Public Works May 19, 2015 Hearing entitled, "Legislative Hearing on S. 1140, The Federal Water Quality Protection Act."

Questions for the Record to Andrew Lemley with Answers

Answers for Chairman Sen. Inhofe:

1. Mr. Lemley, I would like to understand how the "Brewers for Clean Water" partnership with brewers and the Natural Resources Defense Council (NRDC) came about. Did a brewer approach NRDC? Did NRDC approach a brewer?

New Belgium Brewing got involved with the Brewers for Clean Water Campaign with the Natural Resources Defense Council (NRDC) after NRDC read an Op Ed that Jenn Veriver, Director of Sustainability and Strategy for New Belgium wrote in the Huffington Post about the importance of the Clean Water Act for brewers.

2. Was EPA involved in any way with creating, promoting, or supporting "Brewers for Clean Water?"

New Belgium is not aware of any case in which the EPA promoted or supported Brewers for Clean Water. We were never solicited or given any incentives to participate in the group by the EPA.

3. What role did "Brewers for Clean Water" have in organizing a tour by EPA Administrator McCarthy of the Lakefront Brewery in Milwaukee, Wisconsin, in October 2014?

New Belgium Brewing wasn't involved in this event and I do not know the answer.

4. What role did "Brewers for Clean Water" have in organizing EPA Administrator McCarthy's appearance at the Craft Brewers Association Conference in April 2015?

The Craft Brewers Conference in April 2015 is the Craft Beer industry's annual trade show and conference. The Brewers for Clean Water campaign reached out to communicate with us that they had heard that the Administrator was interested in attending, and New Belgium and the Brewers Association did the necessary coordination to invite and host her while at the event.

5. What contacts have you had with EPA about "Brewers for Clean Water" other than filing comments for the record in support of the "Waters of the United States" rulemaking?

In addition to arrangements mentioned above regarding the Craft Brewers Conference, New Belgium worked with the American Sustainable Business Council to host a public event at New Belgium Brewing Company to talk about the proposed rule. Invitations and logistics for the event were handled by the American Sustainable Business Council. EPA staff was present at that event.

6. What involvement has "Brewers for Clean Water" had in developing videos and other internet content for use by EPA?

As far as New Belgium knows, none.

Senator SULLIVAN. Thank you for that outstanding testimony from all our witnesses. We will now turn to a period of some questions.

I want to start by addressing a few comments from Ranking Member Whitehouse. I think it is important for all of us to recognize.

We certainly all want clean water. As I mentioned, my State probably has the cleanest water of anyplace in the world. We are recognized for that. The State does a great job of protecting that. We care more about our clean water and clean environment than any bureaucrat from Washington, DC. and the EPA. I think a lot of the States feel the same way.

Just to remind everyone here, there were some comments about Republicans wanting to undermine the Clean Water Act. This is a bipartisan bill. I think a lot of members on both sides of the aisle recognize that there are some serious issues with this.

We can all trot out that several different groups oppose or support this bill or the regulation but it is pretty dramatic when three-fifths of the States of the United States have serious problems with this Federal regulation.

Mr. Lemley, you mentioned a million comments. I think you might want to take a look at the New York Times article today on the front page and how those comments are coming about. I think the EPA has a lot of questions they need to answer.

Let me start with Ms. Metzger. How important to Kansas is clean water and what does the State do in terms of focusing your State efforts on clean water?

Ms. METZGER. Thank you, Mr. Chairman.

I would echo that a State priority for clean water is similar as you stated. It is a high priority for our State. I appreciate that the Act recognizes that just because waters might lack Federal jurisdiction from protection, it does not lack the protection from State regulations.

Perhaps even more important in Kansas is the cooperative non-regulatory partnership amongst our landowners. We have a really robust program in Kansas that relies on stakeholder feedback and stakeholder cooperation for voluntary approaches to addressing water quality approaches.

That approach has been very successful. We call it our Watershed Restoration and Protection Strategy. It takes funding from EPA and matches that with State and local dollars. It allows us to put in really robust conservation practices. It allows us to achieve those types of successes I noted, being second in the Nation in sediment reduction and sixth in the Nation in phosphorous reduction.

Senator SULLIVAN. Let me ask both you and Mr. Pifher, in terms of consultation, when we held field hearings in Alaska, the universal kind of concern, almost universal, was that there was no serious consultation with key stakeholders, whether States or local municipalities.

Can you two address the issue? Do you think there was significant, substantial or adequate consultation by the EPA with regard to this rule?

Ms. METZGER. For Kansas, we felt that the consultation fell short of what was expected in Executive Order 13132. Instead, the State

comments were just relegated to some of those million comment letters and really diluted our feedback.

Mr. PIFHER. In Colorado, we felt the same, that the consultation prior to the issuance of the rule was far short of what it should have been because we believe we could have assisted the agencies in crafting a rule that would have proven not so controversial.

Senator SULLIVAN. Thank you.

I also want to go to the issue of whether this is an expansion of the Clean Water Act's jurisdiction. I believe Professor Parenteau that you said it was a shrinking of the jurisdiction. I think even the EPA admits that it is an expansion. They say it is about 3 percent.

Let me ask a purely legal question. Does the EPA have the authority as a regulatory agency to unilaterally expand the jurisdiction of the Clean Water Act or is that only the realm and the authority of Congress?

Mr. PIFHER. The EPA is not expanding the jurisdiction.

Senator SULLIVAN. Could you just answer the question I asked?

Mr. PARENTEAU. The EPA is not expanding the jurisdiction.

Senator SULLIVAN. That is not the question I posed.

Mr. PARENTEAU. They are under an order, basically.

Senator SULLIVAN. Will you answer the question I posed? We do not have a lot of time here. Does the EPA have the authority to unilaterally expand the jurisdiction of the Clean Water Act or is that only the realm of the Congress?

Mr. WHITEHOUSE. Mr. Chairman, I think he is entitled to answer your question as he sees fit.

Mr. PARENTEAU. The answer is EPA has the authority to interpret the geographic scope of the Clean Water Act consistent with the way the courts, including the Supreme Court, have interpreted the language of the Act. That is exactly what EPA is doing.

Senator SULLIVAN. Ms. Metzger, do you have an answer to that?

Ms. METZGER. I can give the example of how we interpret the expansion under the proposed rule for Kansas.

Currently, what is approved by EPA as our Waters of the U.S. in the absence of the proposed rule is what we consider those waters with designated uses that are by State statute put into our surface water quality standards. That encompasses a little better than 30,000 stream miles in Kansas.

As we interpret the blanket definition of tributary in the proposed rule, that would result in about 174,000 stream miles. That is a 460 percent increase.

Senator SULLIVAN. Thank you.

Ranking Member Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

First of all, to respond to your comments, it appears to me that every single time we have a hearing in this committee, at least since John Warner, the Republican from Virginia, left, every single time every Republican effort is antagonistic to the environmental protection involved and every single Republican member is opposed to the environmental protection involved.

It happens every time and it is a continuing theme. I stand by my remarks. It is unfortunate and it is very inconsistent with the

tradition and history of your party but it is the way we are right now.

I have a statement from Ranking Member Boxer. I would ask unanimous consent that her statement be made a part of the record.

Senator SULLIVAN. Without objection.

[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR
FROM THE STATE OF CALIFORNIA

Today, the Subcommittee on Fisheries, Water, and Wildlife is meeting to consider legislation that would undermine one of our nation's landmark laws—the Clean Water Act—and roll back protections for small streams and wetlands that provide drinking water to roughly 1 in 3 Americans—or 117 million people.

Decades ago, the United States experienced widespread damage and degradation to our environment—the Cuyahoga River in Cleveland, Ohio, was on fire and our lakes were dying from pollution. The American people demanded action, and in 1972 Congress passed the Clean Water Act by an overwhelming bipartisan majority.

Unfortunately, the legislation before us today, S. 1140, would take us in the wrong direction by removing protections and creating more confusion and uncertainty about which waters are protected.

Recent events in Toledo, Ohio, remind us of that our drinking water remains vulnerable to pollution. Half a million residents in this major American city went without drinking water for days because nutrient pollution washed into Lake Erie, causing toxic algae to bloom.

If we are serious about ensuring that the waterways our children and families rely on for drinking water are free from pollution, we must uphold Clean Water Act protections that have existed for decades.

In response to calls from industry, environmental organizations, and 30 of my Senate Republican colleagues who requested a full rulemaking to clarify the scope of the Clean Water Act, the Obama administration proposed a rule that defines which waters are protected under the Act.

Defending our waterways from pollution used to be a bipartisan issue. And for decades, members of both parties understood that wetlands, lakes, and small streams are interconnected, and water pollution must be controlled at its source.

William Ruckelshaus, EPA Administrator under Nixon and Reagan, highlighted this understanding when he wrote, "Broad Clean Water Act jurisdiction is not only necessary to clean up the Nation's waters. It is necessary to ensure that the responsibility for maintaining and restoring clean water is shared equitably throughout the watershed and from state to state."

S. 1140 ignores the long and successful history of the Clean Water Act. In fact, the bill would change the goal of the Clean Water Act from restoring the "chemical, physical, and biological integrity of the Nation's waters" to instead focus on protecting "traditional navigable waters". When it originally passed the Clean Water Act, Congress rejected the idea that the Act is limited to navigable waters and the courts have consistently said the Act is much broader. Furthermore, this bill arbitrarily excludes large categories of water bodies that are important for water quality and provide drinking water to millions of Americans.

The Obama administration's efforts are about protecting drinking water for American families and businesses, and the process it has undertaken has been open and inclusive. More than 1 million comments were received during a comment period that lasted over 200 days, and over 400 outreach meetings with stakeholders and State and local governments were conducted.

The bill before us would waste millions of taxpayer dollars by requiring EPA to repeat robust outreach efforts that have already been carried out. This is unnecessary and wasteful and does nothing to ensure American families and businesses have clean water.

Instead of advancing a bill that would allow our nation's waterways to become more polluted, we should listen to the wide variety of stakeholders that support the proposed clean water rule. A poll released yesterday shows that 78 percent think Congress should allow the rule to move forward. In addition, a July 2014 poll found that 80 percent of small business owners support protections for upstream headwaters and wetlands in the proposed clean water rule.

It is time to restore much-needed certainty, consistency, and effectiveness to the Clean Water Act. S. 1140 does just the opposite. It would result in further delay, more uncertainty, and less protection for our nation's waterways.

Senator WHITEHOUSE. Close on 5 years ago, Rhode Island had very significant flooding. Climate change is changing the rain patterns in the northeast. The heavy rain bursts are dramatically increasing. I think it is something like 70-some percent.

I remember during the floods going around by helicopter and flying over Narragansett Bay. You could see the flooded rivers and all of the refuse, all of the mud, all of the waste, everything that had been pushed out into what is ordinarily a clean bay because of those storms. It did a lot of damage.

It strikes me that the issue we should be looking at here is not whether a stream is intermittent or not, in fact I think as Mr. Parenteau pointed out, Justice Scalia, who is hardly a liberal, in the Rapanos decision said that seasonal tributaries are covered by this statute.

I think that question is kind of over. Is it foreseeable that these tributaries will deliver significant amounts of waste, pollution, refuse or other things into the waters we all use is the real question.

If it is foreseeable that it will happen, then why is it not logical that we would want to protect downstream users from upstream waste?

Mr. Parenteau, you talked a bit about downstream States. Rhode Island is a downstream State. Will you elaborate a bit on what you mean by downstream States?

Mr. PARENTEAU. Outside of perhaps Alaska and Hawaii, we are all downstream. That is the point. The Supreme Court, years ago, ruled that States no longer have authority under the Federal common law to go to the U.S. Supreme Court to resolve interstate water pollution control problems.

The Supreme Court said the States' only remedy is through the Clean Water Act. That is what the court ruled. The capacity to the 1972 Clean Water Act preempted Federal common law, left the downstream States with no other remedy other than whatever exists under the Clean Water Act. That is the state of the law right now.

Senator WHITEHOUSE. Without this, we have nothing?

Mr. PARENTEAU. That is right.

Senator WHITEHOUSE. Ms. Metzger, you are responsible for activities in the State of Kansas. This is a hypothetical question. If you knew that for 3 weeks a year a big rain was going to come and it was going to flood through what is otherwise a dry, intermittent creek bed and it was going to wash whatever was in there down into waters that your Kansans depend on to be clean and available to them, would you think that was important to regulate?

Ms. METZGER. Those waters, if deemed necessary by the State are protected by our State regulations, not by Federal regulation. We appreciate that S. 1140 goes a little bit further and then says, then let us establish those quantifiable measures for determining those flows that would have Federal jurisdiction.

Senator WHITEHOUSE. Even where you can foresee that waste, pollution, refuse and other things would be washing into the water-

ways of Kansas, you would still say, no, that is not something that the Clean Water Act should regulate?

Ms. METZGER. We feel they are adequately protected with State regulation.

Senator WHITEHOUSE. OK. Good luck with the Supreme Court on that.

Senator SULLIVAN. I think it is a legitimate answer, myself.

Senator WHITEHOUSE. It is just legally wrong.

Senator SULLIVAN. We will see.

Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman.

Ms. Metzger, I would like to read you a front page story today in the New York Times entitled, Critics Hear EPA's Voice in Public Comments.

The story says, "Late last year, the EPA sponsored a drive on Facebook and Twitter to promote its proposed Clean Water Rule in conjunction with the Sierra Club. At the same time, Organizing for Action, a grassroots group with deep ties to Mr. Obama, was also pushing the rule. They urged the public to flood the agency with positive comments to counter opposition from farming and industry groups."

This is important. As the article implies, it says "The Justice Department, in a series of legal opinions going back nearly three decades, has told Federal agencies they should not engage in substantial grassroots lobbying defined as communications by executive officials directed to members of the public at large or particular segments of the public intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive branch of government."

To me it sounds like the EPA is, at worst, violating the law, but if not, at least violating the spirit of the law.

My question is, do you believe the EPA is serious about actually considering the opinions of people from Kansas, from Oklahoma, from Alaska, from Wyoming in drafting this rule if they are actively orchestrating a public relations campaign to support the rule they have drafted?

Ms. METZGER. I can make a couple responses to that. First, I would agree with Mr. Pifher's comments earlier that had EPA fully engaged the States early on, I am not sure we would be here today.

To Mr. Parenteau's comments that the State comments from Kansas do not represent all of the different perspectives and different agencies, our letter to the EPA and the Army Corps of Engineers was a joint letter from Governor Sam Brownback, the Department of Agriculture and our Department of Health and Environment, as well as our Wildlife, Parks and Tourism Divisions, collectively representing all of our different State agencies with the same feedback to the EPA.

At this point, we appreciate that S. 1140 recognizes that fell short of true coordination and consultation with the States. If EPA really felt that was the right step forward and really respected our input in the process, they would not be fearful of S. 1140 and an additional 120-day comment period.

Senator BARRASSO. Thank you.

Mr. Pifher, you mentioned in your written testimony the drought in the West means that States need to construct infrastructure such as new reservoirs and water pipelines to address the need for more water.

Given that drought is a fact of life in many western States, do you believe the EPA's proposed Waters of the U.S. Rule will needlessly slow down much needed, long term and short term water development projects for these States?

Mr. PIFHER. I think it very well may have that effect, unfortunately. Let me give you two observations.

First, I have been associated with the construction of probably two of the largest infrastructure projects in Colorado, water delivery projects, certainly in the last few decades. One was Aurora's Prairie Waters Project, a $600 million pipeline pump station and treatment plant facility. The second was a current southern delivery system being constructed by Colorado Springs utilities at a cost of over $800 million.

The former did not need, because it worked hand in hand with the Corps of Engineers, a Section 404 permit and individual permit and it never triggered NEPA. We went from conceptual design to construction to ribbon cutting in 5 years with mitigation costs of about $1.5 million.

Southern delivery, on the other hand, could not avoid Section 404. It went through the NEPA process and it took over a decade, over $30 million investment in the permitting process and is going to be tens of millions of dollars of additional mitigation. That, in and of itself, is a disincentive.

The other point I would like to make is if you decide to Federalize through rulemaking, what I would consider the arroyos, the washes, the very intermittent, as in once a decade, type of stream system in the West, you are going to force water providers, who need that additional storage for times of drought, to look to the main stem.

What is the difference if you trigger Section 404 and NEPA on the isolated waters and trigger it on the main stem? You might as well increase the certainty of yield and increase the reliability of your project and go on the main stem where no one wants to be really because the environmental impacts could be more damaging.

Senator BARRASO. Thank you.

Mr. Lemley, you referenced EPA Administrator McCarthy. You said she spoke before the Craft Brewers conference and said, according to your written testimony, that nothing in the clean water rules change the exemptions and exclusions agricultural producers have received since the Clean Water Act was passed in 1972.

If this proposed rule is so good for American agriculture, the following groups are supporting my bill: the American Farm Bureau, Agriculture Retailers Association, Soy Bean Association, Sugar Alliance, the Colorado Pork Producers, Corn Refiners, Milk Producers, National Association of Wheat Growers, Beef Association, Chicken Council, Corn Growers, Council of Farmer Cooperatives, the National Turkey Federation, U.S. Poultry, the United Egg Producers, and U.S. Rice Foundation.

Mr. Chairman, I have a whole list of people supporting this. Could I please put that into the record?

Senator SULLIVAN. Without objection.
[The referenced information follows:]

Supporters of the Federal Water Quality Protection Act

U.S. Conference of Mayors
National Association of Counties
National League of Cities
National Association of Regional Councils

Agri-Mark, Inc.
Agricultural Retailers Association
American Agri-Women
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Horse Council
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
American Soybean Association
American Sugar Alliance
Arizona Farm Bureau Federation
Arkansas Pork Producers Association
Associated Builders and Contractors
Association of American Railroads
Association of American Railroads
Association of Equipment Manufacturers (AEM)
Association of Oil Pipe Lines
Association of Texas Soil and Water Conservation Districts
Club Managers Association of America
Colorado Pork Producers Council
Corn Refiners Association
CropLife America
Dairy Producers of New Mexico
Dairy Producers of Utah
Earthmoving Contractors Association of Texas
Edison Electric Institute
Exotic Wildlife Association
Federal Forest Resources Coalition
Florida Sugar Cane League
Foundation for Environmental and Economic Progress (FEEP)
Georgia Pork Producers Association
Golf Course Builders Association of America
Golf Course Superintendents Association of America
GROWMARK, Inc.
Idaho Dairymen's Association
Illinois Pork Producers Association
Independent Cattlemen's Association of Texas
Indiana Pork Producers Association
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
International Liquid Terminals Association (ILTA)
Interstate Natural Gas Association of America (INGAA)
International Council of Shopping Centers
Iowa Pork Producers Association
Irrigation Association
Kansas Agribusiness Retailers Association
Kansas Farm Bureau
Kansas Grain and Feed Association
Kansas Pork Association
Kentucky Pork Producers Association
Leading Builders of America
Michigan Pork Producers Association
Milk Producers Council
Minnesota Agri-Women
Minnesota Pork Producers Association
Missouri Cattlemen's Association
Missouri Corn Growers Association
Missouri Dairy Association
Missouri Pork Association
Missouri Soybean Association

NAIOP, the Commercial Real Estate Development Association
National All-Jersey
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Chicken Council
National Club Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Golf Course Owners Association of America
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council
National Rural Electric Cooperative Association
National Sorghum Producers
National Stone, Sand and Gravel Association (NSSGA)
National Turkey Federation
National Water Resources Association
Nebraska Pork Producers Association, Inc
North Carolina Pork Council
Northeast Dairy Farmers Cooperatives
Oklahoma Farm Bureau
Oklahoma Pork Council
Oregon Dairy Farmer's Association
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Riverside & Landowners Protection Coalition
Select Milk Producers, Inc.
South Dakota Pork Producers Council
South East Dairy Farmers Association
South Texans' Property Rights Association
South Texas Cotton & Grain Association
Southeastern Lumber Manufacturers Association
Southern Crop Production Association
Southwest Council of Agribusiness
Sports Turf Managers Association
St. Albans Cooperative Creamery Inc.
Sugar Cane Growers Cooperative of Florida
Texas Cattle Feeders Association
Texas Forestry Association
Texas Pork Producers Association
Texas Pork Producers Association
Texas Poultry Federation
Texas Seed Trade Association
Texas Sheep & Goat Raisers Association
Texas Wheat Producers Association
Texas Wildlife Association
Texas Wine and Grape Growers
The Associated General Contractors of America
The Fertilizer Institute
The Independent Petroleum Association of America (IPAA)
Treated Wood Council
U.S. Cattlemen's Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association
United Egg Producers
USA Rice Federation
Virginia Agribusiness Council
Virginia Pork Council, Inc.
Virginia Poultry Federation
Virginia State Dairymen's Association
Vocational Agriculture Teachers Association
Washington State Dairy Federation
Western Peanut Growers Association
Western United Dairymen
Wisconsin Pork Association
Wyoming Ag-Business Association
Wyoming Crop Improvement Association
Wyoming Wheat Growers Association

Senator BARRASSO. I can go on and on but I would just say if this proposed rule is so good for agriculture and all of these groups that represent this broad spectrum of American agricultural products are all opposed to the proposed rule, they support this legislation, why are they opposed to this proposed rule then if it is so good for them?

Mr. LEMLEY. Senator, I cannot speak to what their objections to the rule specifically or obviously. I think that is why EPA did have an extended comment period. I think that is why we are waiting for the final rule to come out to see how EPA will respond to their concerns.

Senator BARRASSO. I would just say, Mr. Chairman, it looks like EPA is really trying to game the system with their comment period as the front page of the New York Times today explains.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Barrasso.

Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman. I appreciate you holding this very important hearing today.

Mr. Pierce, in your testimony, you note that the proposed rule considers any water tens of meters below the surface or even lower to be a connection that creates Federal control over isolated water.

What would this expansion mean in a State like Nebraska where we have areas of relatively shallow groundwater? Do you believe that S. 1140 will help prevent EPA and the Corps from controlling isolated water or the ephemeral streams based on those groundwater connections?

Mr. PIERCE. I have not seen the latest draft of the rule that is being talked about as being more expansive than what was proposed. The tens of meters below the ground was the EPA's Connectivity Study which they considered to be close enough to the surface for a connection.

A place like Nebraska, there are many other States where groundwater remains quite close to the ground surface during the years, could be in jeopardy of having a much broader than currently existing jurisdictional review by the Corps and EPA based on an expansion by EPA if they allow connectivity.

They have already taken things like clearly non-jurisdictional swales and they have connected wetlands. This was done about 6 months after the SWANCC court case. They say that a molecule of water could get from a wetland half a mile away, say in California, down a non-jurisdictional swale, therefore, that is connected.

In fact, the entire planet is connected hydrologically, so we cannot argue that. The question is, according to the Supreme Court, whether it is a significant connection or not. That is what this study should have dealt with.

As far as my reading of the EPA Connectivity Study, the only thing in ephemeral waters that they really addressed that was showed as a connection, I did not see it as a connection, they said some ephemeral waters will recharge groundwater.

I looked at every place where they talked about ephemeral waters in that proposed study and that was it. That, to me, is not a connection to navigable waters of the U.S.

Senator FISCHER. Thank you.

We have deep concerns with that in the State of Nebraska where we sit over the Ogallala Aquifer. At least twice a year in the spring and the fall, we have groundwater that rises and truly becomes surface water for a period of time before it then recedes again. I thank you for your perspective on that.

Mr. Pifher, in your testimony, you discussed the failure of the EPA and the Corps to consult with State and local governments, even though they bear the burden of making the regulatory process work on a daily basis.

I was able to chair a field hearing in the State of Nebraska on the proposed rule. I would note that it was brought out at that hearing that according to the EPA's numbers, 58 percent of substantive comments of that almost 1 million comments were opposed to the rule.

It was also brought out at that hearing by our attorney general's office in the State of Nebraska how the rule infringes on our State's authority to protect and manage our resources. Water in Nebraska, whether it is groundwater or surface water, is owned by the people of Nebraska. It is a State resource.

This uncertainty now that we are facing over not just control but also cost helped to develop in Nebraska a very broad coalition opposed to this rule because of that uncertainty, whether it is ag groups, home builders, cities, or counties.

Can you tell me how you think the rule would impact, in Colorado, your State and local programs? At the hearing, we heard about the cost to taxpayers, the cost to citizens, whether a city or county, that they would face by this Federal overreach. Could you address that for Colorado?

Mr. PIFHER. Yes, Senator.

The concerns I have heard in Colorado sort of run the whole gamut among water suppliers, waste water dischargers, how need Section 402 permits, and also those responsible for stormwater, often the public utilities along with their water service duties.

The concern relates to the infrastructure they feel they need to construct in the future, be they water delivery lines so they have redundancy in time of drought or newt storage vessels so they can store water in times of plenty for times where the water supply is lacking.

Small towns with lagoon systems out on the plains of Colorado, for example, may be discharging to a dry arroyo, in fact. Historically, they did not need a Section 402 permit to discharge but under the new proposal could. It is a huge burden for a small town to retrofit, if you will, their wastewater treatment facilities.

Stormwater, even EPA is a real advocate for green infrastructure. I think we all are. We want retention, detention, we want clean water, we want it cleansed before it gets back into our traditional navigable water bodies, yet most of the stormwater facilities that municipal entities and special districts need to construct are in natural swales or low spots, if you will, or drainageways. That is where stormwater goes.

If every time you operate in those areas, you need to pull a Section 404 and potentially even trigger NEPA, it is going to make it very difficult.

The final thing I will say, which I think being fairly close by you are aware of the fires in Colorado, it was of necessity that we got out a week or less after those fires went out, those large fires outside Colorado Springs and Denver.

In the drainageways, we put in detention structures to hold back the sediment flows and debris that would come down the first time you got an athen train even. What would potentially be considered navigable waters of the United States under the proposal? That is problematic.

Senator FISCHER. It would be problematic in your response time, correct?

Mr. PIFHER. Yes, exactly.

Senator FISCHER. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Fischer.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman.

The Clean Water Act is one of America's great success stories. The drama of rivers catching on fire propelled it into law and the importance of clean water to public health and the economy keep it going today.

Cleaning up our waterways takes sustained efforts. In 2013, for the first time in 50 years, the Charles River in Boston was declared clean enough for swimming.

While we have made large improvements in water quality since enactment of the Clean Water Act, there is still more to do. More than half of U.S. rivers are still unsuitable for aquatic life, largely due to fertilizer, runoff and pesticides.

One in four fish are unsafe to eat due to high mercury levels. As much as fish are affected, analysis of 20 million tap water quality tests in 45 States found 316 different contaminants from industrial solvents to weed killers in water supplied to the public over a 5-year period. That is why a strong Clean Water Act is still important today.

Today's hearing primarily concerns the definition of navigable waters, the term which is used in the Clean Water Act and has been the subject of competing interpretations. For all the controversy that surrounds it, however, Congress' legislative intent was clear.

The 1972 conference report states, "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."

Mr. Parenteau, I would like to ask you some questions about that and the Supreme Court's ruling on the issue.

The Supreme Court has held that wetlands are deemed waters of the United States if they significantly affect navigable waters, which term the Court has expressed includes something more than traditional navigable waters. In fact, the Court has twice stated that the meaning of navigable waters in the Act is broader than the traditional meaning of the term.

Mr. Parenteau, is the proposed rule consistent with the Constitution and the decisions of the U.S. Supreme Court?

Mr. PARENTEAU. In my view, it is, Senator Markey. Specifically, with the question of significant nexus, there have been 11 Circuit

Court decisions since the Rapanos case was issued. All 11 have said the Kennedy test is either the controlling test, the Kennedy test is the significant nexus test, is either the controlling test or in one Circuit, the Eleventh Circuit, the exclusive test.

No court has said that Justice Scalia's plurality opinion is the controlling opinion from the Rapanos case. Significant nexus means biological integrity. It does not mean simply the transport of a pollutant from point A to point B.

The Supreme Court unanimously, in the Riverside Bayview case, said the purpose of the Clean Water Act is to protect the ecological integrity of the Nation's waters, an opinion written by Justice White of Colorado, who had knowledge of the western landscape.

Senator MARKEY. Thank you.

Will the proposed rule decrease litigation risk and reduce uncertainty over which types of water bodies are within Federal jurisdiction by defining which waters affect navigable waters and are subject to the Clean Water Act?

Mr. PARENTEAU. Quite the contrary, it will increase litigation because this bill layers on a whole bunch of new terms and new concepts that will all have to be litigated on top of an existing body of case law, including the Supreme Court's decisions in Rapanos.

You are now going to have a whole new wave of litigation trying to understand what this legislation would do in relation to the original legislation and the case law that exists.

Senator MARKEY. Will the rule clarify?

Mr. PARENTEAU. It will not.

Senator MARKEY. It will not clarify.

Mr. PARENTEAU. The Clean Water rule will clarify.

Senator MARKEY. Will the rule clarify?

Mr. PARENTEAU. The rule will clarify, to the extent it can be clarified.

Senator MARKEY. The rule will clarify. The bill will not clarify?

Mr. PARENTEAU. Right.

Senator MARKEY. That is important to get out there.

Mr. Lemley, history has shown that left unprotected, wetlands and the free water purification services they perform are often diminished or destroyed. Do you believe that by protecting these free water cleaning systems the proposed rule will have a positive economic impact on our industry and the economy?

Mr. LEMLEY. Absolutely, there is no question. We are also in Colorado and with the fires we saw and then the flooding we saw, we are very concerned about water quality and the availability of water. We need, in our growing industry, as much clean and abundant water as we possibly can get.

Senator MARKEY. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Markey.

Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Senator Barrasso brought up the article in this morning's New York Times. I would ask unanimous consent that article be made a part of the record.

Senator SULLIVAN. Without objection.

[The referenced information follows:]

The New York Times http://nyti.ms/1dgroVO

U.S.

Critics Hear E.P.A.'s Voice in 'Public Comments'

By ERIC LIPTON and CORAL DAVENPORT MAY 18, 2015

WASHINGTON — When the Environmental Protection Agency proposed a major new rule intended to protect the nation's drinking water last year, regulators solicited opinions from the public. The purpose of the "public comment" period was to objectively gauge Americans' sentiment before changing a policy that could profoundly affect their lives.

Gina McCarthy, the agency's administrator, told a Senate committee in March that the agency had received more than one million comments, and nearly 90 percent favored the agency's proposal. Ms. McCarthy is expected to cite those comments to justify the final rule, which the agency plans to unveil this week.

But critics say there is a reason for the overwhelming result: The E.P.A. had a hand in manufacturing it.

In a campaign that tests the limits of federal lobbying law, the agency orchestrated a drive to counter political opposition from Republicans and enlist public support in concert with liberal environmental groups and a grass-roots organization aligned with President Obama.

The Obama administration is the first to give the E.P.A. a mandate to create broad public outreach campaigns, using the tactics of elections, in support of federal environmental regulations before they are final.

The E.P.A.'s campaign highlights the tension between exploiting emerging technologies while trying to abide by laws written for another age.

Federal law permits the president and political appointees, like the E.P.A. administrator, to promote government policy, or to support or oppose pending legislation.

But the Justice Department, in a series of legal opinions going back nearly three decades, has told federal agencies that they should not engage in substantial "grass-roots" lobbying, defined as "communications by executive officials directed to members of the public at large, or particular segments of the general public, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive."

Late last year, the E.P.A. sponsored a drive on Facebook and Twitter to promote its proposed clean water rule in conjunction with the Sierra Club. At the same time, Organizing for Action, a grass-roots group with deep ties to Mr. Obama, was also pushing the rule. They urged the public to flood the agency with positive comments to counter opposition from farming and industry groups.

The results were then offered as proof that the proposal was popular.

"We have received over one million comments, and 87.1 percent of those comments we have counted so far — we are only missing 4,000 — are supportive of this rule," Ms. McCarthy told the Senate Environment and Public Works Committee in March. "Let me repeat: 87.1 percent of those one-plus million are supportive of this rule."

But critics said environmental groups had inappropriately influenced the campaign — just as environmentalists complained that the energy industry improperly drove policy during the George W. Bush administration.

At minimum, the actions of the agency are highly unusual. "The agency is supposed to be more of an honest broker, not a partisan advocate in this process," said Jeffrey W. Lubbers, a professor of practice in administrative law at the American University Washington College of Law and the author of the book "A Guide to Federal Agency Rulemaking."

"I have not seen before from a federal agency this stark of an effort to generate endorsements of a proposal during the open comment period," he said.

Senator James M. Inhofe, Republican of Oklahoma and chairman of the environment committee, is holding a hearing on Tuesday to examine the proposed rule. "There is clear collusion between extreme environmental groups and the Obama administration in both developing and promoting a host of new regulations," he said.

The most contentious part of the E.P.A.'s campaign was deploying Thunderclap, a social media tool that spread the agency's message to hundreds of thousands of

people — a "virtual flash mob," in the words of Travis Loop, the head of communications for E.P.A.'s water division.

The architect of the E.P.A.'s new public outreach strategy is Thomas Reynolds, a former Obama campaign aide who was appointed in 2013 as an associate administrator. "We are just borrowing new methods that have proven themselves as being effective," he said.

But industry critics said the agency's actions might be violating federal lobbying laws.

The proposed rule tries to ensure the safety of drinking water by expanding or at least clarifying the federal government's jurisdiction to prevent the pollution of wetlands and streams that feed water sources.

The E.P.A.'s tactics in supporting the rule are clearly designed to move public opinion, at a time when Congress was considering legislation to block the agency from putting the rule into effect.

"The agency has relentlessly campaigned for the rule with tweets and blogs, not informing the public about the rule but influencing the public to advocate for the rule," said Ellen Steen, general counsel at the American Farm Bureau Federation. "That is exactly what the Anti-Lobbying Act is meant to prevent."

The strategy to build public support for the clean water rule builds on the agency's promotion of its climate change policy. The White House hired Mr. Reynolds, a seasoned political operative, to run the climate change outreach effort after he directed regional media operations for the president's 2012 re-election.

He set off what he called a "flood-the-zone approach" to push back against opponents of the E.P.A.'s climate rule in the Republican Party and the coal industry, injecting the digital savvy of Mr. Obama's presidential campaigns into the agency's effort. "There is a huge premium on social media," Mr. Reynolds said. "Facebook, YouTube, Twitter, Instagram, Vine, Pinterest."

Jeffrey R. Holmstead, an energy industry lobbyist and an E.P.A. deputy in the Bush administration, said the E.P.A. was "using campaign and advocacy strategies to promote a regulatory action." But he and other experts said the agency's actions did not appear to cross a legal line.

Obama administration officials insist they had to counter industry opponents to the climate change and water rules who were engaged in their own campaign to undermine them.

"The fact that there's a very well-funded campaign means we needed a strong and sustained communications effort," said Heather Zichal, Mr. Obama's former senior climate adviser.

In March last year, when the E.P.A. proposed the clean water regulation, opponents hit back fast. The American Farm Bureau kicked off a public relations effort summarized by its Twitter nickname: Ditch the Rule.

The Farm Bureau was supported by home builders, the fertilizer and pesticide industries, oil and gas producers and a national association of golf course owners who collectively called for the E.P.A. to revamp or withdraw its proposal. That demand was echoed by more than 230 members of the House.

As the opposition mounted, leaders of major environmental groups held closed-door meetings with senior E.P.A. officials as the rule was being written, participants in these meetings said.

Mr. Reynolds doubled down on a social media campaign to defend the water rule.

The agency created its own Twitter hashtag, #DitchtheMyth, which Ms. McCarthy publicized, backed up with YouTube videos and Facebook postings that countered the criticism. But the campaign also specifically urged support for the effort — directing the public to the E.P.A. website, where the rule was explained and a prominent tab invited readers to leave a comment. Mr. Reynolds insisted that the agency specifically did not urge the public to contact Congress.

Organizing for Action also urged members to get involved, a message that the E.P.A. reinforced. Major environmental groups, including the Sierra Club and the Natural Resources Defense Council, became "thunderous supporters" of the effort.

The Thunderclap effort was promoted in advance with the E.P.A. issuing a news release and other promotional material, including a photograph of a young boy drinking a glass of water.

"Clean water is important to me," the message said. "I want E.P.A. to protect it for my health, my family and my community."

In the end, the message was sent to an estimated 1.8 million people, Thunderclap said.

In a separate appeal, Mr. Loop, of the E.P.A., wrote a blog post on the agency's website with pictures of himself, his two children and his dog swimming in waters near his Maryland home, and ending with a pitch.

He urged anyone reading the post to "spread the word about how much it matters to you and your family and friends."

"Here is an easy way to do that," he wrote. "Take a photo holding this #CleanWaterRules sign. Post it to Facebook, Twitter or Instagram with #CleanWaterRules and give your reason. Encourage family and friends to do the same."

Those efforts to prompt people to support the rule are now being cited as evidence that the E.P.A. has illegally engaged in so-called grass-roots lobbying.

"E.P.A. Office of Water's Twitter account has essentially become a lobbyist for the proposal," wrote Kevin P. Kelly, chairman of the National Association of Home Builders, in a letter to the E.P.A. protesting the role the agency has played in advocating its clean water proposal.

Gov. Dennis M. Daugaard of South Dakota and some members of Congress have filed protests using almost exactly the same language, suggesting that the industry players are coordinating their response.

In its previous opinions to federal agencies, the Justice Department has indicated that "grass-roots" efforts are most clearly prohibited if they are related to legislation pending in Congress and are "substantial," which it defined as costing about $100,000 in today's dollars — a price tag that the E.P.A.'s efforts on the clean water rule almost certainly did not reach if the salaries of the agency staff members involved are not counted.

Officials at the E.P.A. strongly defend their work — insisting that they did not violate the Anti-Lobbying Law because they never explicitly urged the public to lobby Congress, just to express their support for the plan in a public way.

"We are well within our authority to educate the American people about the importance of what E.P.A. is doing to act on climate change and protect public health," Mr. Reynolds said. "There is a very clear line, and we never, ever cross it."

Correction: May 18, 2015

Because of an editing error, an earlier version of this article misstated the stance of the coal industry on a clean water rule. It did not oppose the rule.

A version of this article appears in print on May 19, 2015, on page A1 of the New York edition with the headline: Critics Hear E.P.A.'s Voice in 'Public Comments' .

Senator INHOFE. I would also like to make sure the record notes what the EPA actually conducted, the New York Times suggests, was an unprecedented grassroots lobbying campaign that may violate Federal law.

I want to make sure everyone knows I have already asked the Government Accountability Office to look into this matter.

One of the things I hear different people discussing, the liberals in the U.S. Senate and in the House, I would say, is it is always offensive when people talk about the States, what they want, and the individuals.

I am reminded when this issue first came surfaced, it was to take the word "navigable" out. My good friend from Massachusetts will remember this because the authors of that bill were Senator Feingold and Representative Oberstar. This was many years ago.

Not only did we overwhelmingly defeat that legislation but both of them were defeated the next time they came up for reelection. The people really are plugged into this thing.

Right now, 32 States have already said they support this. This is what is coming from the States. It is almost offensive to people here in Washington.

I do not think anyone has talked about the regional treasures yet I think it was Administrator McCarthy who told the National Farmers Union that the EPA plans to finalize a rule that will go even further than the original proposed by regulating regional treasures.

Ms. Metzger, do you want to address that for us? It should be a part of this hearing.

Ms. METZGER. Absolutely. Thank you, Mr. Chairman.

I believe a map is being held up that shows that the Central Great Plains eco-region covers a good portion of Kansas. If we looked at the isolated waters mapped within that area, our wetlands that are not under Federal jurisdiction, number somewhere in the neighborhood of more than 480,000 acres that would then fall under the jurisdiction of the Clean Water Act if that was considered jurisdictional.

Similar to expansion of the stream mile, that would divert State resources currently used for protecting our waters of the U.S. toward additional acres that could then be better used for other State programs. That would cause significant concerns.

Senator INHOFE. If you look at that map, you see that Oklahoma and Kansas, almost exactly the same percentage, would fall into that category.

In Oklahoma, Tom Buchanan is the President of the Oklahoma Farm Bureau. He made a statement and most of the rest of the Farm Bureaus have added their names to the statement. He said the major problems facing the farmers and the ranchers in my State of Oklahoma have nothing to do with anything that is found in the agriculture bill. Instead, it is over regulation by the EPA.

When they talk about the endangered species and all these things that are happening through over regulation of the EPA, the No. 1 concern is the issue we are talking about today.

I noticed, Mr. Pifher, I guess you are the one who had this picture. I asked to see a copy. Out in the panhandle of Oklahoma it

is walking distance to both Kansas and Colorado. This could just as well have been in Oklahoma.

Mr. Pifher, Mr. Lemley and Mr. Parenteau claim that the Waters of the United States Rule is needed to protect the drinking water of 117 million people and that S. 1140 does not provide that protection. Do you want to respond to that statement?

Mr. PIFHER. I believe the drinking water source for all citizens actually is adequately protected under the Clean Water Act and the Safe Drinking Water Act today. In fact, it has been over a decade I think since EPA issued a directive to all the States to identify what are called source water protection scenarios.

At that time, I ran the Colorado Water Quality Control Division and we were very diligent in completing that task, working with local towns, cities and other water provider communities. They all submitted their delineation and that became part of our water quality standards program.

I think we have adequate protection in place.

Senator INHOFE. Thank you very much.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Inhofe.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

I have a question for Ms. Metzger and also Mr. Pifher. I would like to read the statement and then ask your thoughts.

Claiming that a definition imposes no cost on State and local governments or small businesses, EPA and the Corps chose to ignore laws and Executive Orders that would have required them to develop the proposed rule in partnership with the States and after evaluating local government and small business impacts.

In fact, the summary of the rulemaking on OMB's website says that the Waters of the United States Rule is not a major rule and makes the following statements. One, there is no regulatory flexibility analysis required. Two, there are no small entities affected, so there are no small business impacts. Three, there are no government levels affected. Four, there does not need to be a federalism consultation because of that.

To both of you, I want to know, do you agree with these statements? Second, under S. 1140, would the EPA and the Corps be able to simply skip a regulatory flexibility analysis, small business impact analysis or a federalism impact analysis?

Ms. METZGER. Regarding the first question, we would disagree. This is a major rule. We appreciate that S. 1140 doesn't provide any wiggle room of doing the proper evaluation and consultations that you described.

We talked a bit about the lack of consultation and the appropriate level of federalism related to the cost in our comment letter that we provided to the proposed rule. We gave a very specific example of the cost incurred by the States if the proposed rule were put in place.

We expend about $300,000 of State funds every year conducting about 500 use attainability analyses on our designated waters. If this rule were to go into effect, we could expect that State expenditure for use attainability analysis, we would have to redo the 500

that we do on an annual basis and should expect we would have to do additional ones as new waters are brought into jurisdiction.

Those are precious State resources that could be spent achieving other water quality protection.

Senator ROUNDS. Mr. Pifher.

Mr. PIFHER. I would just add one, I agree with what was said by Ms. Metzger. It would increase the number of use attainability analyses that have to be performed not only by the State but by local governments who have to seek some water quality standard modifications to what historically were not treated as jurisdictional waters.

The State would also bear the cost of doing Section 401 certifications. If you need a Federal license or permit, like a Section 404 permit, the State has to certify that the project being permitted meets all appropriate State water quality requirements.

Part of the Section 401 certification is an anti-degradation review which is also, at times, quite lengthy and expensive to perform. Generally, States do not have the resources to expand those programs.

At the local level, utilities or special districts are responsible also for waste water from discharges and stormwater control facilities meeting MS–4 stormwater permit requirements. To the extent you Federalize more and more waterways, it becomes more difficult to ensure compliance with those types of permit requirements.

Senator ROUNDS. Thank you.

Mr. Pierce, in your testimony, you state that in the EPA Connectivity Study, which formed the basis for the rule, water that is as deep as 10 meters below the surface is shallow enough to represent a surface connection.

You go on to say that rather than a technical study focused on connectivity, EPA should have undertaken a study on what constitutes significant in the context of significant nexus.

Is it your contention that the EPA failed to ask the Science Advisory Board the proper relevant questions regarding the surface connections and what constitutes a significant nexus when seeking scientific advice regarding the proposed rule?

Mr. PIERCE. I think the fault was with whoever in EPA decided to do a study internally, first of all, because those people were directed to do a study on connectivity. They should have been directed to do a study on significant as in significant nexus.

I cannot fault the Science Advisory Board because they simply were provided with a study that EPA produced and asked to evaluate it. They did it. I do not know that it is in their mandate to tell the EPA that you did the wrong study for a particular reason, but they simply evaluated the study that was done.

Anybody who has ever been in science and dealt with hydrology knows that systems are all connected. That was kind of meaningless and most of the study that EPA did was based on flood plains being connected to their rivers in which their flood plain exists. That is kind of a no brainer.

The question was, what about the connectivity of ephemeral streams way up in the far, removed from the navigable waters of the U.S. That was addressed very minimally.

Senator ROUNDS. Thank you.

Mr. Chairman, my time is up but I would like to ask your permission to enter into the record a copy of a letter to the Corps of Engineers from me regarding the question and the comment period and whether or not the comments sent to the EPA and the Corps of Engineers where there is a discrepancy or a misconnect between the EPA's comment about a million comments coming in and the favorability versus what the Corps of Engineers had done and the Corps of Engineers' response showing that of those unique responses, 60 percent of those unique responses were opposed to this new rule, Waters of the U.S., versus 29 percent in favor, significantly different than what the EPA had suggested of 89 percent being favorable and their explanation.

Senator SULLIVAN. Without objection.

[The referenced material was not received at time of print.]

Senator ROUNDS. Thank you.

Senator SULLIVAN. I have a few more questions to wrap up.

One of the issues I think has been controversial about the WOTUS rule is the legal basis of the rule. We have asked the EPA Administrator to provide us the legal opinion they have used as the basis for promulgating the rule.

Senator Rounds also talked about the Connectivity Report. This question is open to any of the witnesses to comment.

In terms of the process, Professor Parenteau, in your testimony, you talked about the science and some of the science for the rule was based on the Connectivity Report. One of the problems for people commenting was that the Connectivity Report was not finalized before the EPA issued the final proposed rule. The Final Connectivity Report was never available during the public comment period on the proposed rule.

The report upon which the rule is based was never out in time for people to analyze it before the period of comment on the rule was closed. Would anyone like to comment on that?

I have the specific dates with regard to when the rule came out, when the Connectivity Report came out, but the review and the final Connectivity Report was not completed until January 15, 2015, over 2 months after the comment period had ended on the rule upon which it was based which to me seems to be the exact backward way in which to develop a rule based on science.

Would any of the witnesses care to comment on that?

Mr. PIERCE. I commented on the draft study, EPA study, because that was all that was available. I personally found that you are absolutely right, that is not the way science should work, nor the way the Regulatory and Administrative Procedures Act should work.

They based a proposed rule on something that was not finalized and then the SAB did not get its report done either because it was working with a proposed study. That is not the way this is supposed to work.

I will say to their credit that this is the first time EPA has bothered to go through the APA procedures in changing jurisdiction. They have been doing it for a long time just through guidance documents. At least they made an effort but it certainly was not an effort one would think would be based on good science.

First of all, there was the wrong study, connectivity instead of significant analysis, and then not even a completed study when they did the proposed rule.

Senator SULLIVAN. Professor Parenteau.

Mr. PARENTEAU. I have a couple of points. I am not going to apologize for EPA if they got things out of order. I will say that several things about the Connectivity Report need to be emphasized.

One, EPA's rule does not go as far as the Connectivity Report suggests it could go. It does not go as far as the science suggests it could go. That is an important point that has been sort of overlooked here.

Two, EPA asked the Science Advisory Board for information to inform its significant nexus determination. The reason they asked for the Connectivity Report approach is because Justice Kennedy, in his controlling opinion, said the key question is, in the aggregate, how do streams and wetlands affect the chemical, physical, biological integrity of the Nation's waters.

It was this aggregate concept that Justice Kennedy imposed that had to be addressed in EPA's rulemaking. The science was designed to inform that aggregate analysis of headwaters, streams and their role. That is why the process works the way it did. The fact that the SAB validated EPA's approach is the most important point.

Senator SULLIVAN. Thank you for that.

Mr. Pifher.

Mr. PIFHER. I was just going to add that we did comment, NWRA and other western water interests, on the procedural flaw, if you will, in this process. Maybe more important was the scope of the charge, as Mr. Pierce has pointed out, was incorrect.

The Science Advisory Board, in reviewing the work on the report, said there really was a failure to identify the gradient of connectivity that was necessary before you would Federalize a water body. This gradient concept really boils down, I think, to significance. There was a failure to determine what is significant relative to water quality.

Senator SULLIVAN. Mr. Pierce, did you have an additional comment?

Mr. PIERCE. I was just going to respond to Mr. Parenteau's statement. The fact is that I am not an attorney but I have read Justice Kennedy's opinion also. Justice Kennedy is not saying all biological, chemical or physical interaction is something that brings an area into a water of the U.S. It is significant nexus.

The other point is that the proposed rule right now will make things a lot easier because everything that is a physical channel will be regulated by the Federal Government. There will be no question about that whatsoever.

If you want to get to the science of protecting water quality, you need to go to the dry land and regulate it because that is where most groundwater recharge occurs, not in wetlands and not in streams. That is where most runoff originates that goes into streams that washes down into Narragansett Bay from the uplands.

If you dump material right here on the banks of the Potomac that is out of the jurisdiction and nobody is even claiming that it is in jurisdiction, it will get into the Potomac River far faster than it will if you dump something way up in the hinterlands in western Maryland and it has to come all the way down and try to get to the Potomac.

Senator SULLIVAN. Thank you.

I want to ask one final question. It goes to some of the comments Senator Inhofe made. Ms. Metzger, this is for you, but again, any of the panelists can comment.

Senator Inhofe talked about the role of the States and how important that is. It is not just the sense of the Congress in terms of this committee, it is actually the foundation of the Clean Water Act.

The beginning of the Clean Water Act stated "It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution, to plan the development and use of land and water resources."

Do you think the WOTUS Rule, particularly the way in which the consultation provision occurred but more generally, overarching aspects of it, do you think that actually fits with this policy delineated at the outset of the Clean Water Act?

Ms. METZGER. I would echo what we have stated before that proper consultation with the States really fell short in this process. Moving forward, I think even today's panel recognizes the diversity of feedback and concerns expressed with developing the proposed rule. I think there have even been concerns about delaying this even further.

I think if the proposed rule were to be issued today without any further consultation, we would see much more significant delays in the form of lawsuits and other measures.

S. 1140 gives really positive, clear steps forward in opening that consultation with the States appropriately and by wintertime, we would have more assurance of adequate Clean Water Act in the WOTUS definition with which we would feel more comfortable.

Senator SULLIVAN. Other comments on that question?

I ask unanimous consent that the following comments from the following organizations be included for the record: the U.S. Chamber of Commerce, the American Road and Transportation Builders Association, American Farm Bureau Federation, Arizona Farm Bureau Federation, Portland Cement Association, International Council of Shopping Centers, Oklahoma Farm Bureau, Kansas Farm Bureau, Public Lands Council, National Cattlemen's Beef Association and their State affiliates, National Association of Counties, U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, a letter signed by over 80 agricultural organizations from across the U.S., the Water Advocacy Coalition, a group of 60 organizations from a diverse group of industries, and a list of 188 other organizations who support S. 1140.

[The referenced information follows:]

CHAMBER OF COMMERCE
OF THE
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April 30, 2015

The Honorable John Barrasso
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The Honorable Joe Donnelly
United States Senate
Washington, DC 20510

Dear Senators Barrasso and Donnelly:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, supports the "Federal Water Quality Protection Act" and the Committee's efforts to address the Environmental Protection Agency's and U.S. Army Corps of Engineers' significant jurisdictional overreach as these agencies prepare to finalize their proposed definition of "waters of the United States."

If finalized, the proposed rule will greatly expand federal jurisdiction over water and land, which will affect a wide variety of permitting requirements and Clean Water Act programs. The agencies have not adequately addressed the significant and negative impact its proposed definition would have on numerous land uses, or the fact that it would undermine and complicate state and local regulatory programs. The proposed rule is likely to have a negative impact on a large portion of the U.S. economy, as it slows, or brings to a complete halt, numerous projects major and minor.

Equally important, the agencies proposed the rule without conducting sufficient regulatory impact analyses or adequately consulting with state and local governments or interested stakeholders.

For these reasons, it is critical that Congress direct the agencies to limit federal jurisdiction over water and land, consistent with prior Supreme Court decisions and the long-understood concepts of cooperative federalism embodied in the Clean Water Act. It is also essential that the agencies be required to consider and comply with all regulatory impact analysis requirements, and conduct meaningful consultation with stakeholders. The Federal Water Quality Protection Act would effectively and appropriately limit federal jurisdiction, and require the agencies to conduct a full and procedurally proper rulemaking process.

The Chamber supports the Federal Water Quality Protection Act and appreciates your leadership on this very important issue and the leadership of original cosponsors, Senators Inhofe, Heitkamp, Roberts, Manchin, Sullivan, Rounds, Blunt, McConnell, Capito, and Fischer.

Sincerely,

R. Bruce Josten

cc: Members of the United States Senate

American Road & Transportation Builders Association

May 18, 2015

Dear Senator Barrasso:

On behalf of the more than 6,000 members of the American Road and Transportation Builders Association (ARTBA) I commend you for introducing the "Federal Water Quality Protection Act." This important legislation would prohibit the promulgation of a proposed rule drafted by the U.S. Environmental Protection Agency (EPA) to dramatically increase federal jurisdiction under the Clean Water Act (CWA).

ARTBA is particularly concerned with the treatment of roadside ditches under the proposed rule. Current federal regulations say nothing about ditches, but the proposed rule expands EPA jurisdiction to the point where virtually any ditch with standing water could be covered. There is no environmental advantage to be gained from regulating roadside ditches not connected to tributaries or other waterways. **Further, roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands since they are an essential part of any transportation improvement project and contribute to the public health and safety of the nation by dispersing water from roadways.**

In addition, the proposed rule creates a completely new concept of allowing for "aggregation" of the contributions of all similar waters "*within an entire watershed.*" This concept results in a blanket jurisdictional determination—meaning the EPA could regulate the complete watershed. **Such a broadening of jurisdiction would literally leave no transportation project untouched regardless of its location**, as there is no area in the United States not linked to at least one watershed. While there are certainly instances where a permit is appropriate for the impacts of transportation construction, these situations should be evaluated on a case-by-case basis where specific environmental benefits can be evaluated.

Finally, allowing EPA's proposed rule to become final could jeopardize significant bipartisan progress made in the area of streamlining the review and approval projects for transportation improvement projects. Requiring a permit for every ditch, regardless of ecological value, would lead to lengthy delays and significantly increased costs for future transportation improvements and yield no ecological value in return.

To prevent EPA's unprecedented attempt to expand CWA jurisdiction **ARTBA will be pleased to help you secure passage of the "Federal Water Quality Protection Act."**

Sincerely,

T. Peter Ruane

T. Peter Ruane
President & CEO

PRIDE
THE ARTBA BUILDING, 1219 28TH ST., N.W., WASHINGTON, D.C. 20007
Phone: (202) 289-4434 • Fax: (202) 289-4435 • Internet: www.artba.org

AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024

ph. 202.406.3600
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April 30, 2015

The Honorable James Inhofe
Chairman
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510

The Honorable Barbara Boxer
Ranking Member
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510

Dear Senators Inhofe and Boxer:

I am writing on behalf of the American Farm Bureau Federation (AFBF), the nation's largest general farm organization, concerning the *Federal Water Quality Protection Act*. AFBF strongly supports passage of this critical legislation and we urge all members of the Senate to vote for the bill.

The *Federal Water Quality Protection Act* addresses critical concerns we have with EPA's "waters of the U.S." proposed rule. There can be no question that the rule poses a serious threat to farmers, ranchers and private landowners. The proposal, if finalized, would allow EPA to regulate well beyond the limits authorized by Congress and affirmed by the Supreme Court. Simply put, EPA's proposed rule would significantly expand the scope of "navigable water" subject to Clean Water Act (CWA) jurisdiction. As a practical matter, it would increase permitting requirements and result in increased costs, delayed decisions and third party litigation, all of which would burden the economy and raise consumer costs without advancing the objectives of the CWA.

The *Federal Water Quality Protection Act* takes a responsible approach to ensure a final rule reflects the limits authorized in the Clean Water Act. This legislation guides agencies in this rulemaking in a way that, without diminishing their authority, respects the legitimate views of local and state officials, the regulated community, and Congress itself – and which still allows the agencies to proceed with a rule based on their stated intent – clarity and certainty.

The *Federal Water Quality Protection Act* deserves strong, bipartisan support and we applaud Senators Barrasso and Donnelly's leadership in producing a practical approach to guide EPA in its rulemaking efforts. We look forward to working with members of the Senate to ensure swift consideration.

Sincerely,

Bob Stallman
President

Cc: Sen Barrasso and Sen Donnelly

Arizona Farm Bureau Federation
325 South Higley Road, Suite 210
Gilbert, Arizona 85296

April 29, 2015

The Honorable Jim Inhofe
Chairman
Senate Committee on Environment and Public Works
205 Russell Senate Office Building
Washington, DC 20510

The Honorable Barbara Boxer
Ranking Member
Senate Committee on Environment and Public Works
112 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The Arizona Farm Bureau strongly supports the *Federal Water Quality Protection Act*.

Our farm and ranch members have many, significant concerns about the rule jointly proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to redefine "waters of the U.S." under the Clean Water Act and how it will negatively impact their ability to grow crops and raise livestock. The *Federal Water Quality Protection Act* works to address significant flaws in the proposed WOTUS rule and requires the development of a new proposal after the agencies have engaged in meaningful stakeholder consultation. Timing is critical, as the sooner Congress acts, the sooner the agencies can re-craft a rule that more accurately reflects the will of Congress while respecting the concerns of all affected parties. Additionally, by acting before a rule is final, Congress can provide the best opportunity and path to ensure that a final rule is practical, reflects Congressional intent, and safeguards environmental benefits.

We further support this legislation because it establishes sound principles to guide the agencies' action on a "waters of the U.S." rule so that the final result reflects the statutory limits created by Congress. This legislation guides the agencies with regulatory principles that, when followed, will achieve greater balance and generate more widespread acceptance of the final provisions. We urge you to give strong support and quick consideration to *the Federal Water Quality Protection Act*.

Sincerely,

Kevin Rogers, President
Arizona Farm Bureau Federation

PCA
America's Cement Manufacturers™

Portland Cement Association
1150 Connecticut Avenue, NW, Suite 500
Washington, DC 20036-4104
202.408.9494 Fax 202.408.0877
www.cement.org

April 30, 2015

The Honorable James Inhofe
Chairman
Committee on the Environment and Public Works
The U.S. Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

The Portland Cement Association (PCA) appreciates the leadership you and your colleagues on the Senate Committee on the Environment and Public Works are demonstrating in promoting policies that balance environmental stewardship and a healthy economy. PCA represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states. Collectively, these companies account for approximately 80% of domestic cement-making capacity, with distribution centers in all 50 states.

Cement makers share your committee's concerns regarding the U.S. Environmental Protection Agency's (EPA) and the Corps of Engineers' (Corp.) proposed rule redefining "waters of the U.S." under the Clean Water Act. Our concerns are based on the expansive effects it will have on the Agencies' regulatory authorities – effects which go well beyond Congressional direction and Supreme Court holdings. They are also based on the fact that the rule will add significant costs to our plant operations with little environmental benefit.

On numerous occasions PCA has urged EPA and the Corps to withdraw the proposed rule and to work with state and local officials and stakeholders to develop a proposal that respects the jurisdictional limitations that have been imposed by Congress and affirmed by the Supreme Court. The procedural requirements contained in "Federal Water Quality Protection Act of 2015 initiate a process that will achieve this balance, while ensuring environmental protection. Additionally, we appreciate the fact that the legislation outlines helpful parameters to guide federal regulators in crafting a balanced rule.

Cement makers applaud your committee's leadership and the bipartisan efforts of Senators Barrasso and Donnelly in offering the "Federal Water Quality Protection Act of 2015." If you have any questions or need more information, please contact me.

Very truly yours,

James G. Toscas
President and Chief Executive Officer

Copy: Members of the Committee on the Environment and Public Works

May 15, 2015

The Honorable James Inhofe
Chairman
Senate Environment and Public
Works Committee
Washington, D.C. 20510

The Honorable Barbara Boxer
Ranking Member
Senate Environment and Public
Works Committee
Washington, D.C. 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The International Council of Shopping Centers (ICSC) writes to endorse S. 1140, *The Federal Water Quality Protection Act*. ICSC expresses its thanks for your close examination of the impacts of the proposed joint rulemaking by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to change the scope of federal jurisdiction under the Clean Water Act (CWA).

Founded in 1957, ICSC is the premier global trade association of the shopping center industry. Its more than 63,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers and brokers, as well as public officials. Recognizing the need for a clean environment and the benefits that it brings to communities, ICSC members have a vested interest in preserving and protecting our nation's land and water resources. As environmental stewards, shopping center developers construct vital business districts and help create thriving communities while maintaining, protecting and enhancing our natural resources.

ICSC is appreciates the decades of partnership between federal, state, and local governments to achieve the objectives of the CWA. S. 1140 requires EPA and the Corps engage in meaningful consultation with relevant state and local officials to formulate recommendations for a consensus regulatory proposal that would identify the scope of waters to be covered under the CWA, and those waters to be reserved for the states to determine how to regulate.

In light of the significant impacts that this rule will have on job creation in industries such as real estate, construction, and transportation and infrastructure, the importance of getting the rule "right" cannot be overstated. S. 1140 makes significant strides in avoiding costly and burdensome new rules for property owners and the state and local partners that have provided a legacy of precise guidance for the regulated community. Thank you for your leadership on this important issue.

Sincerely,

Abigail G. Jagoda
Director, Federal Government Relations
International Council of Shopping Centers

International Council of Shopping Centers
555 12th St., N.W. Suite 660, Washington, D.C. 20004
+1 202-626-1400 • Fax: +1 202-626-1418 • www.icsc.org

OKLAHOMA FARM BUREAU
2501 N STILES • OKLAHOMA CITY, OK 73105-3126 • (405) 523-2300

April 30, 2015

The Honorable Jim Inhofe
Chairman
Senate Environment and Public Works Committee
205 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Inhofe,

On behalf of Oklahoma's largest agricultural organization, thank you for your leadership in introducing the *Federal Water Quality Protection Act*. We are gratified to see the Senate take action on this important issue. As you know, Oklahoma Farm Bureau members have significant concerns about the rule jointly proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to redefine "waters of the U.S." under the Clean Water Act.

The *Federal Water Quality Protection Act* addresses significant flaws in the proposed WOTUS rule and requires the development of a new proposal after the agencies have engaged in meaningful stakeholder consultation. We applaud this legislation because it establishes sound principles to guide the agencies' action on a "waters of the U.S." rule so that the final result reflects the statutory limits created by Congress.

We believe that adoption of this common-sense legislation will ultimately ensure protection of private property rights for Oklahoma's farmers and ranchers, while safeguarding the quality of our Nation's waters.

Thank you for your consideration in this matter.

Sincerely,

Tom Buchanan
President

cc: Oklahoma Farm Bureau Board of Directors

KANSAS FARM BUREAU
The Voice of Agriculture

2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785-587-6000 • Fax 785-587-6602 • www.kfb.org

Office of the President

April 29, 2015

The Honorable Jim Inhofe
Chairman
Senate Committee on Environment and Public Works
205 Russell Senate Office Building
Washington, DC 20510

The Honorable Barbara Boxer
Ranking Member
Senate Committee on Environment and Public Works
112 Hart Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Chairman
Senate Committee on Agriculture, Nutrition and Forestry
109 Hart Senate Office Building
Washington, DC 20510

The Honorable Debbie Stabenow
Ranking Member
Senate Committee on Agriculture, Nutrition and Forestry
731 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Inhofe, Ranking Member Boxer, Chairman Roberts and Ranking Member Stabenow:

Kansas Farm Bureau strongly supports the *Federal Water Quality Protection Act* and is committed to working with the bill's cosponsors to urge its swift consideration by the Senate.

Kansas Farm Bureau has been a vocal opponent of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed joint rule to redefine "waters of the U.S." under the Clean Water Act. The *Federal Water Quality Protection Act* addresses many of our concerns and, significantly, requires the agencies to hold substantive meetings with the industries and civic entities affected by the proposed WOTUS rule.

Prompt action on the bill will allow EPA and the Corps to re-draft the proposed rule to reflect our concerns and Congressional intent and ensure the final rule is practical and environmentally sound.

The legislation gives sound guidance to the agencies so that a final "waters of the U.S." rule reflects Congress' statutory limits and regulatory principles that will achieve greater balance and prompt more widespread acceptance of the final rule.

Kansas Farm Bureau urges strong support for and quick consideration of the *Federal Water Quality Protection Act.*

Sincerely,

Richard Felts
President

May 18, 2015

Honorable James Inhofe
Chairman
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20515

Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, D.C. 20515

Honorable Daniel Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
410 Dirksen Senate Office Building
Washington, D.C. 20515

Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
456 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Senators,

The undersigned organizations represent cattle producers across the country. We urge your support of S. 1140, the *Federal Water Quality Protection Act*. This legislation would require the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to withdraw the flawed "waters of the U.S." (WOTUS) rule and develop a new proposed rule with input from stakeholders and direction from Congress.

As strong stewards of the land we manage, we are deeply concerned about the rulemaking jointly proposed by EPA and the Corps to redefine WOTUS under the Clean Water Act.

There is significant disagreement between the federal agencies, the states, local governments, and the regulated community about the scope and effect of the rulemaking. The introduction of S. 1140 follows months of respectful urging of EPA and the Corps to withdraw the proposed rule and work with these stakeholders to develop a proposal that respects the jurisdictional limitations imposed by Congress and affirmed by the U.S. Supreme Court.

We commend the language in S. 1140 which sets parameters for further agency action on a WOTUS rule so that the final result reflects congressional intent. By requiring EPA and the Corps to withdraw the proposed rule, S. 1140 appropriately initiates a process that will further protect our nation's environmental assets, assure our ability to engage in robust economic activity, and earn broad support from state and local officials and the regulated community. We urge you to vote for passage of S. 1140, the *Federal Water Quality Protection Act,* and to oppose any amendments that would weaken the legislation.

Sincerely,

National Cattlemen's Beef Association
Public Lands Council

Alabama Cattlemen's Association
Arizona Cattle Feeders Association
Arizona Cattle Growers' Association
Arkansas Cattlemen's Association
California Cattlemen's Association
Colorado Cattlemen's Association
Colorado Livestock Association
Florida Cattlemen's Association
Georgia Cattlemen's Association

Hawaii Cattlemen's Council
Idaho Cattle Association
Illinois Beef Association
Indiana Beef Cattle Association
Iowa Cattlemen's Association
Kansas Livestock Association
Kentucky Cattlemen's Association
Louisiana Cattlemen's Association
Michigan Cattlemen's Association
Minnesota State Cattlemen's Association
Mississippi Cattlemen's Association
Missouri Cattlemen's Association
Montana Stockgrowers Association
Nebraska Cattlemen
Nevada Cattlemen's Association
New Mexico Cattle Growers Association
New York Beef Producers' Association
North Carolina Cattlemen's Association
North Dakota Stockmen's Association
Ohio Cattlemen's Association
Oklahoma Cattlemen's Association
Oregon Cattlemen's Association
Pennsylvania Cattlemen's Association
South Carolina Cattlemen's Association
South Dakota Cattlemen's Association
Tennessee Cattlemen's Association
Texas & Southwestern Cattle Raisers Association
Texas Cattle Feeders Association
Utah Cattlemen's Association
Virginia Cattlemen's Association
Washington Cattle Feeders Association
Washington Cattlemen's Association
West Virginia Cattlemen's Association
Wisconsin Cattlemen's Association
Wyoming Stock Growers Association

cc: Honorable John Barrasso
Honorable Joe Donnelly

April 29, 2015

The Honorable James Inhofe
Chairman
Senate Environment and Public Works Committee
United States Senate
Washington, DC 20510

The Honorable Barbara Boxer
Ranking Member
Senate Environment and Public Works Committee
United States Senate
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

On behalf of the nation's mayors, counties, cities and regions, we are pleased to offer our support for the Federal Water Quality Protection Act, sponsored by Senators John Barrasso and Joe Donnelly, which reaffirms the federal-state-local partnership in protecting water resources. We urge the Senate Environment and Public Works Committee to move quickly to pass the bill.

The Federal Water Quality Protection Act addresses our long-standing concerns with a proposed rule offered by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) last year to redefine the "waters of the U.S." definition under the Clean Water Act (CWA). The proposed rule stems from a draft guidance document on "waters of the U.S." that was originally released in 2011.

Since before the proposed rule's publication, our groups have brought to the attention of EPA and the Corps legitimate concerns about the potential impacts of the proposed rule on localities. In an effort to have our concerns addressed, we have requested an understandable and straight-forward rulemaking process, inclusive of a federalism consultation, and have urged the agencies not to move forward until further analysis has been completed. Most recently, we outlined these concerns with the rulemaking process, as well as identified specific concerns with the impacts of the proposed rules on our members, in joint comments to the agencies. Those concerns are summarized below.

In our view, the rulemaking process was defective on several fronts. First, throughout the rulemaking process, the agencies failed to consult states and localities consistent with the Executive Order 13132: Federalism. As defined by this order, federal agencies are required to consult with state and local governments as early and often as possible before a proposed rule is developed or published in the Federal Register to ensure that federal rules are workable and obtainable for all levels of government. As key partners in our nation's intergovernmental system who partner with federal and state governments to

implement CWA programs, it is important that all the levels of government work together to form practical and workable rules and regulations that achieve our shared goals of protecting water resources, ensuring the safety of our communities and minimizing unnecessary delays and costs. In this case, that has not occurred.

Second, we believe the analysis used to support the proposed rule is faulty. As proposed, the rule would impact all state and local CWA programs, not just the Section 404 program, which is the sole focus of the agencies' *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* that accompanied the proposed rule. Previous Corps guidance documents on "waters of the U.S." clarifications have also been strictly limited to the Section 404 permit program. However, there is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." A change to the "waters of the U.S." definition may have far-reaching and unintended consequences for all CWA programs, including Section 402 National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process and Spill Prevention, Control and Countermeasure (SPCC) programs. We have asked the agencies to conduct a more comprehensive review of the actual costs and consequences of the proposed rule on these programs, which has not been done to date.

Moreover, the agencies' economic analysis relies on incomplete data. The limited scope of this analysis bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. We have repeatedly raised concerns about the potential costs and the data points used in the analysis, which have yet to be addressed.

Finally, mayors, counties, cities and regions have significant concerns with the substance of the proposed rule. While we agree that there needs to be a clear, workable definition of "waters of the U.S.," we do not believe the proposed definition provides the certainty and clarity needed for operations at the local level. The proposed rule includes undefined and confusing new terms with the potential for sweeping impacts across all CWA programs. For example, the proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that could increase the types of public infrastructure considered jurisdictional under the CWA. Our groups have worked with the agencies to clarify these key terms but have received little assurance about how each EPA or Corps region will interpret and implement the new definition.

To conclude, the Federal Water Quality Protection Act requires the EPA and the Corps to work closely with states and local governments to develop a new proposed "waters of the U.S." rule as partners with the federal government in implementing and enforcing CWA programs. The Act is consistent with our belief that states and localities should be consulted in meaningful ways on rules before they are formally proposed, especially if the rule will have a significant impact on capital costs, operations and mandates for the people we serve as required under federal law.

We thank you for your leadership on this important piece of legislation. If you have any questions, please contact us: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Joanna Turner (NARC) at 202-618-5689 or Joanna@narc.org.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Matthew D. Chase
Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Joanna L. Turner
Executive Director
National Association of Regional Councils

Cc: Senator John Barrasso
Senator Joe Donnelly

April 30, 2015

The Honorable Jim Inhofe
Chairman
Senate Committee on Environment and Public Works
205 Russell Senate Office Building
Washington, DC 20510

The Honorable Barbara Boxer
Ranking Member
Senate Committee on Environment and Public Works
112 Hart Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Chairman
Senate Committee on Agriculture, Nutrition and Forestry
109 Hart Senate Office Building
Washington, DC 20510

The Honorable Debbie Stabenow
Ranking Member
Senate Committee on Agriculture, Nutrition and Forestry
731 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Inhofe, Ranking Member Boxer, Chairman Roberts and Ranking Member Stabenow:

The undersigned agricultural organizations would like to convey our strong support for the *Federal Water Quality Protection Act*. We are committed to working with Senators Barrasso and Donnelly in pressing for its swift consideration by the Senate.

Our organizations have significant concerns about the regulatory action jointly proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to redefine federal jurisdiction for "waters of the U.S." under the Clean Water Act. The *Federal Water Quality Protection Act* addresses significant flaws in the proposed WOTUS regulation and requires a more comprehensive regulatory proposal after the agencies have fully engaged in meaningful stakeholder consultation and administrative procedures. The sooner Congress acts, the sooner the agencies can re-craft a rule that more accurately reflects the will of Congress, while respecting the concerns of all affected parties. By acting before the agencies' regulation is promulgated, Congress can provide the best opportunity and path to ensure that a final rule is practical, reflects congressional intent, and ensures appropriate environmental safeguards.

We applaud this legislation because it establishes sound principles to guide the agencies' action on a "waters of the U.S." rule so that the final result reflects the statutory limits created by Congress and ensures proper administrative procedures are followed. This legislation guides the agencies with regulatory principles that, when followed, will achieve greater balance and generate more widespread acceptance of the final provisions. We urge you to give strong support and quick consideration to the *Federal Water Quality Protection Act*.

Sincerely,

Agri-Mark, Inc.

American Agri-Women
American Farm Bureau Federation
American Horse Council
American Soybean Association
American Sugar Alliance
Arkansas Pork Producers Association
Association of Texas Soil and Water Conservation Districts
Colorado Pork Producers Council
Dairy Producers of New Mexico
Dairy Producers of Utah
Earthmoving Contractors Association of Texas
Exotic Wildlife Association
Georgia Pork Producers Association
GROWMARK, Inc.
Idaho Dairymen's Association
Illinois Pork Producers Association
Independent Cattlemen's Association of Texas
Indiana Pork Producers Association
Iowa Pork Producers Association
Kansas Agribusiness Retailers Association
Kansas Grain and Feed Association
Kansas Pork Association
Kentucky Pork Producers Association
Michigan Pork Producers Association
Milk Producers Council
Minnesota Agri-Women
Minnesota Pork Producers Association
Missouri Cattlemen's Association
Missouri Corn Growers Association
Missouri Dairy Association
Missouri Pork Association
Missouri Soybean Association
National All-Jersey
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Chicken Council
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Pork Producers Council
National Sorghum Producers
National Turkey Federation
Nebraska Pork Producers Association, Inc
North Carolina Pork Council
Northeast Dairy Farmers Cooperatives

Oklahoma Pork Council
Oregon Dairy Farmer's Association
Riverside & Landowners Protection Coalition
Select Milk Producers, Inc.
South Dakota Pork Producers Council
South East Dairy Farmers Association
South Texans' Property Rights Association
South Texas Cotton & Grain Association
Southwest Council of Agribusiness
St. Albans Cooperative Creamery Inc.
Sugar Cane Growers Cooperative of Florida
Texas Cattle Feeders Association
Texas Forestry Association
Texas Pork Producers Association
Texas Pork Producers Association
Texas Poultry Federation
Texas Seed Trade Association
Texas Sheep & Goat Raisers Association
Texas Wheat Producers Association
Texas Wine and Grape Growers
U.S. Cattlemen's Association
U.S. Poultry & Egg Association
United Egg Producers
USA Rice Federation
Virginia Agribusiness Council
Virginia Pork Council, Inc.
Virginia Poultry Federation
Virginia State Dairymen's Association
Vocational Agriculture Teachers Association
Washington State Dairy Federation
Western Peanut Growers Association
Western United Dairymen
Wisconsin Pork Association
Wyoming Ag-Business Association
Wyoming Crop Improvement Association
Wyoming Wheat Growers Association

Cc: Sen. Barrasso and Sen. Donnelly

WATERS ADVOCACY COALITION
WAC

April 30, 2015

Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senators Inhofe and Boxer:

The Waters Advocacy Coalition (WAC) strongly supports the *Federal Water Quality Protection Act* and urges swift action by the Senate to approve the bill. WAC is committed to working with the legislation's sponsors, Senators Barrasso and Donnelly, to advance that objective.

WAC is a broad coalition representing the nation's construction, real estate, mining, agriculture, transportation, forestry, manufacturing, and energy sectors, as well as wildlife conservation and recreation interests. WAC supports the *Federal Water Quality Protection Act* because it offers an excellent glide path to a revised "waters of the U.S." (WOTUS) rule that will improve the quality of the nation's navigable waters, ensure the ability of all Americans to engage in robust economic activity, and earn broad support from state and local officials and the regulated community.

There is significant disagreement between the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) and the states, local governments, and the regulated community about the scope and effect of the WOTUS rule jointly proposed and soon to be finalized by EPA and the Corps. The procedural requirements contained in the bill, together with the substantive guidance that has been incorporated based, in large part, on public commitments made by the agencies, will allow EPA and the Corps to finalize a rule that achieves the appropriate clarity and certainty sought by all sides of the WOTUS issue.

EPA has characterized the WOTUS rulemaking as important with long lasting effects. Thirty-seven states have voiced strong opposition to the rule, including 27 states that joined the national organizations of mayors, cities and county officials in asking EPA to withdraw the rule and start over. Congress should act now to ensure that the rulemaking is done well and that the many concerns expressed about the proposed rule are properly addressed within the jurisdictional limitations imposed by Congress and affirmed by the U.S. Supreme Court.

Accordingly, we will urge your Senate colleagues to cosponsor and vote "yes" on the *Federal Water Quality Protection Act.*

Sincerely,

Agricultural Retailers Association
American Exploration & Mining Association
Association of American Railroads
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors
The Associated General Contractors of America
Association of American Railroads
Association of Equipment Manufacturers (AEM)
Association of Oil Pipe Lines
Club Managers Association of America
Corn Refiners Association
CropLife America
Edison Electric Institute
Federal Forest Resources Coalition
The Fertilizer Institute
Florida Sugar Cane League
Foundation for Environmental and Economic Progress (FEEP)
Golf Course Builders Association of America
Golf Course Superintendents Association of America
The Independent Petroleum Association of America (IPAA)
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
International Liquid Terminals Association (ILTA)
Interstate Natural Gas Association of America (INGAA)
Irrigation Association
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
Leading Builders of America
National Association of Manufacturers
National Association of REALTORS®
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Club Association
National Corn Growers Association

National Cotton Council
National Council of Farmer Cooperatives
National Golf Course Owners Association of America
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Southern Crop Production Association
Southeastern Lumber Manufacturers Association
Sports Turf Managers Association
Texas Wildlife Association
Treated Wood Council
U.S. Chamber of Commerce

cc: Honorable John Barrasso
Honorable Joe Donnelly

Senator SULLIVAN. Senator Whitehouse, do you have anything else you would like to submit for the record?

Senator WHITEHOUSE. I have a closing comment if I may.

Senator SULLIVAN. Yes.

Senator WHITEHOUSE. The Clean Water Act and clean water regulation has, for always since back when it was a common law doctrine and through the establishment by Congress of the Clean Water Act and through the EPA's administration of that law, had the purpose of defending the downstream recipient of upstream waste, pollution and bad disposal. That really is at the heart of what we need to do.

I am from Rhode Island. We are a downstream State. Coastal States are downstream States. While I appreciate Ms. Metzger's concern for the well being of the waterways of Kansas, the idea that as a downstream sovereign State, I have to depend on what another State does in order to protect the waters that flow through me is inconsistent with the entire history of clean water regulation.

I love Massachusetts. They are our neighboring State. Most of our rivers start in Massachusetts, but the idea that I, as Rhode Island, would be comfortable allowing the Massachusetts Department of Environmental Protection or the Massachusetts agricultural agency be the only agency that has a word to say about how the waters of Rhode Island, how Narragansett Bay, how my riparian users are treated, makes no sense. That is not acceptable.

That is not proper federalism. It is not why we set up the Federal Government to begin with.

To me, the notion that the U.S. Government has no role in protecting a downstream State and its members from upstream pollution is an extraordinary idea. It is an extraordinary idea.

What often goes overlooked here is that those of us who want the environmental protection here are actually giving up a fair amount in this EPA rule as Professor Parenteau has said and as many observers have noted to the problem of under inclusion and over inclusion by this regulation.

There is probably going to be error but there is going to be error on both sides. When you look at some of the agricultural activities and their capacity for pollution, which we are not protected from, when we look at the capacity of particular types of storm bursts we are seeing in New England, to wash that sort of stuff down predictably, foreseeably, to have an effect on our downstream users, I wish Mr. Lemley was in Rhode Island because we have great waters too, but he is very concerned, as our many people, about what the upstream use is.

There has to be a method by this. There has to be a role for EPA, stuff that foreseeably is going go to flow into downstream waters has to be protected against in some way, even if it is only intermittent flow.

If you know every September the big storms come through and are going to wash all that junk down into the next State's waters, that next State needs some place to go. Because State interests will always put the interest of their home State industries first, it is not adequate for our coastal States to count on that.

I want to make sure that point is clear in the record. There are downstream States that need protection and there is very substan-

tial under inclusion in the proposed rule as well. There is very significant pollution that will still be permitted without regulation at all to harm downstream users under the proposed rule. We are concerned about that as a downstream State.

I thank all the witnesses and I thank the Chairman for the hearing.

Senator SULLIVAN. I have one final comment.

I think Senator Whitehouse raises an important point. I do think key elements of S. 1140 actually address the downstream issue. We can continue to work on that.

Let the record reflect that I will leave the record of this hearing open for ten additional calendar days in order for additional comments to be submitted.

The hearing is now adjourned. Thank you very much.

[Whereupon, at 11:34 a.m., the subcommittee was adjourned.]

[An additional statement submitted for the record follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

I am very pleased to be an original cosponsor of the Federal Water Quality Protection Act. Let me explain why this bipartisan legislation is so incredibly important.

Last April, EPA and the Corps of Engineers proposed a rule that would significantly expand Federal control over land and water by expanding the definition of "waters of the United States" under the Clean Water Act.

Claiming that this definition imposes no costs on State and local governments or small businesses, EPA and the Corps chose to ignore the laws and Executive Orders that would have required them to develop the proposed rule in partnership with States and after evaluating local government and small business impacts.

Instead, they wrote it behind closed doors. The result was a disaster and the proposed rule was roundly criticized by States, local governments, small businesses, farmers, and many others.

EPA's response to this criticism is very telling. Rather than withdrawing their proposal and starting over with the input of farmers, small businesses, local governments and States, EPA went into campaign mode.

EPA held over 400 meetings and calls. However, instead of acknowledging legitimate concerns, EPA's outreach effort was focused on convincing people that EPA knows best. For some audiences, their message was: "The sky is falling. Without this rule, we can't protect your drinking water." For other audiences, particularly farmers, the message was: "Don't worry; the rule will not change anything."

Despite all this outreach, EPA has still not responded to legitimate questions raised by State and local governments and others. In fact, we submitted questions to Administrator McCarthy on February 24 and after 3 months we still have not received her responses.

At our February 4 hearing on the rule, EPA Administrator McCarthy told Congress they would make changes to address concerns, but she also told us that the substance of the final rule would not be significantly different from the proposal. It is clear that no amount of questions or concerns is going to change their minds and Congress needs to provide some direction.

Our legislation does not allow the rule to forward in its current form. EPA and the Corps of Engineers will have to go back and comply with the laws and Executive Orders that are designed to improve regulations and report to Congress on how they met those obligations.

The legislation does not write the rule for them. It does not address every water body that might be regulated by the Federal Government or left to State regulation.

But, we do set forth some principles and guidelines for EPA and the Corps to follow when they rewrite the rule.

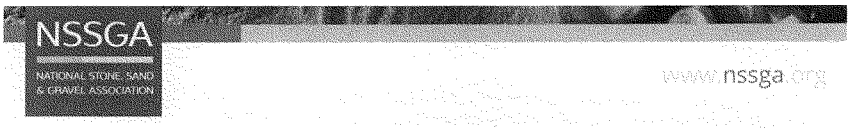
Importantly, the bill tells EPA and the Corps that they need to focus on water bodies. Not puddles, ditches, groundwater, and overland sheet flow.

They also need to focus on the ability of water pollution to reach navigable water. This means they cannot use the movement of birds, animals and insects, or nature's water cycle to create Federal control over land and water. EPA may say that all water is connected, but that does not support Federal regulation.

By introducing this bill together, both Republicans and Democrats want to make sure that EPA and the Corps actually listen to States, local governments and other stakeholders, keep their promises, and issue a regulatory definition of "waters of the United States" that recognizes that Congress did not give the Federal Government control over all water.

I look forward to hearing your thoughts on this legislation.

[Additional material submitted for the record follows:]



STATEMENT FOR THE RECORD
OF THE

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

LEGISLATIVE HEARING ON

"S. 1140, THE FEDERAL WATER QUALITY PROTECTION ACT."

SUBMITTED BY THE

NATIONAL STONE, SAND & GRAVEL ASSOCIATION

May 19, 2015

The National Stone, Sand and Gravel Association (NSSGA) appreciates the opportunity to submit testimony to the Senate Committee on Environment and Public Works "Legislative Hearing on S. 1140, The Federal Water Quality Protection Act." NSSGA fully supports this act and urges its swift passage.

Aggregates producers are an essential American industry that serves as a barometer for the rest of the U.S. economy. Stone, sand and gravel are essential to any construction project—public and private. When the demand for our products is high, the nation is growing, jobs are being created and essential national assets are being built. If the aggregates industry is doing well, America is doing well.

NSSGA members are deeply concerned that if finalized, the Environmental Protection Agency and the U.S. Army Corps of Engineers' (the agencies) rule defining the scope of waters protected under the Clean Water Act (CWA) will be devastating to the aggregates industry and impact the price of aggregates and the products that they go into—like hospitals, bridges and highways. Because many aggregate deposits were created by water, they are often located near water. The rule is a dramatic expansion for the aggregates industry and will make existing and future operations much more difficult and costly with little or no discernable environmental benefit.

Our members urge Congress to act now, and not wait for the final rule. Once the rule is final, businesses, states and local officials are at risk of fines and penalties. They will have no recourse other than the courts. Prolonged litigation is not clarity or certainty. Two-thirds of the states oppose the rule, demonstrating that EPA did not fully address impacts to stakeholders.

The effects of a final rule will be immediate and severe. Financing organizations may curtail loan applications and funding until the final rule's uncertain provisions are resolved. Ultimately, our members and others will postpone new project starts or halt construction, which will have a chilling effect on the economy. Ultimately this change could disrupt the supply of aggregates to our biggest customers, government agencies; thus affecting highway, airports, and municipal construction projects. Increased costs will be borne by taxpayers.

It is critical that Congress act before the rule is finalized rather than repeal it via the Congressional Review Act (CRA). Once passed, the CRA prevents the agencies from ever proposing an alternative regulation unless explicitly authorized by Congress. The agencies would lose any future rulemaking ability, unless Congress passed another law to begin the rulemaking again. Instead of passing two bills in the future, Congress should just pass one now. Acting before a rule is final provides the best opportunity and path to ensure that a final rule is practical, reflects Congressional intent, and achieves environmental benefits along with the clarity and balance necessary for robust economic activity.

The agencies claim this rule will provide clarity and certainty regarding federal jurisdiction over water, consistent with the limitations set by Congress and affirmed by the U.S. Supreme Court. Instead, the proposed rule uses and connects undefined terms and new definitions with familiar terms in a way that creates confusion and risk, while providing the agencies with almost unlimited authority to regulate at their discretion.

Our members are disappointed that after being urged repeatedly to submit comments on the rule (and doing so in over 200 separate instances), the agencies sent the final rule for interagency review so quickly they could not possibly have reviewed and addressed all million comments.

Under the proposed rule, many previously non-jurisdictional areas like waters within floodplains, wet weather conveyances, upland headwaters, ephemeral streams and "similarly situated waters" could be considered jurisdictional. Thus, nearly any area our members try to access is likely to be more heavily regulated, and could require additional permit conditions such as costly mitigation. The agencies have offered no indication of how these broad new terms will be implemented, creating even more uncertainty; uncertainty that this rule is intended to eliminate.

Most troubling, the proposed rule includes no reference to flow, which will be particularly problematic for the arid west. Dry stream beds and other conveyances that may have water only once per decade or more could now be regulated. This is in stark contrast to the 2008 Guidance and court directives. While the agencies have stated the final rule will fix certain aspects of the proposed rule, including ditches and water treatment systems, they maintain their authority over dry stream beds and ephemeral waters, which they have previously regulated only in very rare instances. We appreciate the fact that S.1140 requires that EPA exclude dry stream beds and other features with a remote and insubstantial connection to navigable waters.

When our members – experts with decades of experience in the field– look at their existing and future sites, they estimate an increase in regulated areas of 50-100 percent. Obtaining a jurisdictional determination can be a significant undertaking. While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms; 15 to 30 years is not uncommon. The companies in our industry are concerned that past understandings of what would be jurisdictional will now be subject to review. A change in what is considered jurisdictional can have significant impacts on construction material reserves, which will affect the life of facilities and delay the start-up of new sites.

The agencies claim this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water run-off and require detailed storm water pollution prevention plans. These plans are required for every project; both during construction and continuously after operations begin. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended.

The agencies pride themselves on the extensive state outreach prior to releasing this proposed rule. However, the fact that an unprecedented two-thirds of the states have commented negatively on this rule demonstrates that EPA did not address their concerns in the rule. States and localities will bear an enormous financial burden under this rule. When states and local governments discuss the increased costs and delays that (see Transportation and Infrastructure

Hearing Testimony) this proposed rule will cause, they are basing their reading of the rule on a long history of dealing with these matters in the field. And, their concerns are exactly the same as that of our industry and many others.

The agencies claim this rule is based on sound science, but it is based upon studies of "connection" not whether such connections are significant, which is what they are allowed to regulate. They have, in the connectivity study, answered a question no one has asked or disputed. Additionally, they ignored House Science Committee requests to have the Science Advisory Board, the group of independent scientists reviewing it, even consider the issue. Therefore, the results of this study will not provide a meaningful basis for the vast jurisdictional expansion.

The economic analysis of the rule does not accurately reflect costs to businesses if this rule is finalized. It is not even close. One NSSGA member calculated that to do the additional mitigation for an expansion of an existing site under this rule would be more than $1,000,000; this is just for one site in an industry with about 10,000 sites across the country. Another member calculated that the costs for mitigation at one of their sites would jump from $200,000 to $2.75 million under the proposed rule. Another member estimated a $30 million dollar cost to just one region of their company.

If it is determined development of a site will take too long or cost too much in permitting or mitigation, the aggregates industry won't move forward. That means a whole host of economic activity in a community will not occur--all of this in the name of protecting a dry stream bed with a marginal connection to navigable water.

Taken further, a significant cut in aggregates production could lead to a shortage of construction aggregate, raising the costs of concrete and hot mix asphalt products for state and federal road building and repair, and commercial and residential construction. NSSGA estimates that material prices could escalate anywhere from 80 percent up to 180 percent. As material costs increase, supply becomes limited, which will further reduce growth and employment opportunities in our industry. Increases in costs of aggregates for public works would be borne by taxpayers, and delay of road repairs and other crucial projects. Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry that is unwarranted and would adversely impact aggregates supply and vitally important American jobs.

This rule potentially will harm not only aggregates operators and the nation's transportation infrastructure, but the economy as a whole, stifling the nascent economic recovery and further growth. To prevent these immediate and severe impacts to the economy, we urge Congress to pass legislation requiring withdrawal of the rule and further consultation with stakeholders and financial analysis before re-proposal, with clear exclusions.

ABOUT NSSGA

NSSGA member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the U.S., and there are more than 10,000 aggregates operations across the United States.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs, proximity to market is critical; unlike many other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. There are also competing land uses that can affect the feasibility of any project. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30 to 100 percent. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

Aggregates are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are used for many environmental purposes, including pervious pavements and other LEED building practices, the treatment of drinking water and sewage, erosion control on construction sites, and the treatment of air emissions from power plants. While Americans take for granted this essential natural material, it is imperative for construction of our infrastructure, homes, and for positive growth in our communities.

The aggregates industry removes materials from the ground, then crushes and processes them. Hazardous chemicals are not used or discharged during removal or processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential and business communities, farm land, parks, or nature preserves.

Over the past eight years, the aggregates industry has experienced the most severe recession in its history. This expansion of jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39 percent since 2006. While stone, sand and gravel resources may seem to be ubiquitous, construction materials must meet strict technical guidelines to make durable roads and other public works projects. Because many aggregate deposits were created by water, they are often located near water. The availability of future sources of high quality aggregates is a significant problem in many areas of the country and proposed changes in what is considered jurisdictional will make the problem worse.

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Society for Freshwater Science

www.freshwater-science.org

May 19, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: SFS Strongly Opposes S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The Society of Freshwater Science strongly opposes S.1140, confusingly titled the "Federal Water Quality Protection Act." It is our professional opinion that S.1140 would derail a near-final EPA rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to clarify longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

SFS is a scientific society with more than 1600 members from around the world whose research and professional activities focus on the physical, chemical, and biological structure and function of rivers and streams and other shallow-water ecosystems. SFS promotes and advocates the use of the best available science for decision-making related to freshwater ecosystems and communicates this science as necessary to inform the public, environmental managers, and decision makers.

More than a century of scientific research, much of it produced by members of our Society, has clearly shown that headwater, ephemeral, intermittent, and small perennial streams, as well as lakes, wetlands, and groundwater habitats associated with these waters, are an integral part of the physical, chemical, biological, and ecological quality of entire river networks and their downstream receiving waters. Although some small streams and wetlands may not have a surface connection to larger water systems throughout the year, hydrologic connectivity does exist and these systems in aggregate directly influence and regulate the chemical, physical, and biological integrity of all of the Nation's waters. The Clean Water Act (CWA), as it is presently being interpreted, cannot adequately provide the means to restore and maintain the chemical, physical, and biological integrity of all of the Nation's waters unless it includes headwaters and adjacent waters as "waters of the U.S." Specifically, our research shows that headwaters:

- affect chemical integrity by their capacity to uptake, retain, transform and transport nutrients and contaminants;

- affect the physical integrity of waterways by controlling rates of runoff, water flow, and sediment delivery;
- affect the biological integrity of waterways by providing food resources, thermal refuges, spawning sites, nursery areas, and essential habitat for unique plants and animals, including numerous threatened and endangered species;
- are often profoundly altered by human activities, to the detriment of downstream water bodies and the public interest; and
- are likely to be among the first freshwater ecosystems to be affected by climate change.

Based on this science, it would be impossible to adequately restore and maintain the chemical, physical, and biological integrity of the Nation's waters without explicitly including headwater and adjacent waters as part of "waters of the U.S." Further, we note that since inception of the CWA there have been significant improvements to water quality and the health of aquatic ecosystems of the Nation, in part due to the historically broad scope of protection.

With these observations in mind, **SFS supported the proposed EPA rulemaking effort to more clearly define the jurisdictional Waters of the United States in this rule** (see our comment here) and we provided comments that substantively improved the final rule. We especially complimented the United States Environmental Protection Agency for the thorough and rigorous process used in developing the science to support their rulemaking. This scientific work included one of the most comprehensive reviews to date, a detailed and extensive report providing the content and implications of that comprehensive review[1], commitment to a rigorous independent review process, and an additional review by the EPA Science Advisory Board. We praise the Agency for the scope, extent, and quality of its science.

In contrast, S. 1140 does not reflect current scientific knowledge nor has it been exposed to rigorous independent peer review.

Specifically, S. 1140 rejects the key scientific principles and findings of the EPA rulemaking, undermining the ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays. It is our professional opinion, that as a result of S. 1140:

- **Many streams would be harder to protect.** The bill would include streams identified in a USGS data set that, among other limitations, doesn't generally pick up streams that are less than a mile long. The bill neglects inclusion of additional streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway. This ignores the volumes of research produced by freshwater scientists clearly demonstrating the connectivity and importance of small intermittent streams to water quality.
- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways. Research by freshwater scientists clearly defines the importance of adjacent wetlands to water quality and the importance of the entire watershed context.
- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of

[1] U.S. Environmental Protection Agency (USEPA). 2013. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. US Environmental Protection Agency, Washington, D.C. EPA/600/R-11/098B.

wetlands that are "next to" other protected waterways. The effect of these exemptions would be to allow waste into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution. Again, work by freshwater scientists has shown that the connection of isolated wetlands through intermittent surface and groundwater flowpaths is integral to the quality of downstream waters.

In addition, SFS has the following concerns about the bill:

- **S. 1140 appears to exclude certain long-protected water bodies by narrowly defining "body of water" to ignore many man-made tributaries, even where they essentially function as natural streams, and even though such waters have significant impacts on downstream waters.**
- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any "organism,"** despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds. This rule seems to directly contradict the very preamble of the Clean Water Act to protect and restore physical, chemical, and **biological** integrity [emphasis added].
- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding**
- **The bill rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

And, most importantly, as members of the scientific community and advocates for the use of sound science in decision-making, a requirement of government agencies set by the US legislative and executive branches, we are most concerned about the following:

- **The conclusions in S. 1140 are contrary to the weight of scientific evidence. They are not based on sound science.**
- **The recommendations and assertions in the bill have not been exposed to scientific peer review.**

We are on the verge of securing a scientifically sound Clean Water Rule that will bolster the effectiveness of the Clean Water Act in maintaining and restoring our nation's waters. We urge Congress to support the agencies' final Clean Water Rule, respecting decades of robust scientific literature that demonstrate the critical role of aquatic systems and clarifying and restoring longstanding protections for these vital waters by clarifying their coverage under the Clean Water Act

Respectfully,

David Strayer, Ph.D.
President, Society for Freshwater Science

cc: Administrator McCarthy, Environmental Protection Agency
Asst. Secretary Darcy, United States Army Corp of Engineers
Secretary Vilsack, United States Department of Agriculture
Secretary Jewell, United States Department of Interior
Chair Goldfuss, Council on Environmental Quality

CAL DOOLEY
PRESIDENT & CEO

May 20, 2015

The Honorable James Inhofe
Chairman, Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

The Honorable Barbara Boxer
Ranking Member, Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The American Chemistry Council (ACC) supports S. 1140, the Federal Water Quality Protection Act, and encourages the Senate to approve the bill. We applaud the efforts of its cosponsors, Senators Barrasso and Donnelly, and are committed to working with them to secure its approval.

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is an $812 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for twelve percent of all U.S. exports.

As proposed, the rulemaking by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") to define their jurisdiction under the Clean Water Act ("waters of the U.S." rulemaking) would vastly expand these agencies' authority over a number of water systems that, for a variety of geographic and structural reasons, have been considered non-jurisdictional and should remain as such. Aside from yielding little to no environmental benefit, a jurisdictional determination for these systems would trigger a host of regulatory compliance requirements that must be justified with robust environmental and scientific considerations. Unfortunately, the "waters of the U.S." proposal fails that test.

Many of our industry's facilities rely on the use of systems like cooling water canals, firewater ponds, stormwater retention ponds, barge canals, and manmade ditches as part of their plants' internal infrastructure. Often, these systems lack any connection to navigable waters and should remain non-jurisdictional. Re-classifying them as "waters of the U.S." would impose a multitude of burdensome and unnecessary compliance requirements on these facilities, including expensive

700 2nd Street, NE, Washington, DC 20002 | (202) 249-7000

and time-consuming re-permitting periods, potentially leading to substantial modification (in some cases complete shutdown) of efficient management practices currently in use.

The Federal Water Quality Protection Act (S. 1140) represents an important step forward in remedying many of the most serious concerns present in the "waters of the U.S." rulemaking. The legislation provides the agencies much-needed technical guidance in determining which streams and wetlands should – or should not – be designated "waters of the U.S."

S. 1140 helps reduce ambiguity and clarify the rulemaking by creating definitive – although non-exhaustive – lists of what should and should not be considered "waters of the U.S." for jurisdiction purposes. The bill would ensure that the agencies' jurisdiction is properly established by covering only those connections between waterways that can be scientifically justified; that is, those connections that are quantifiable and statistically valid for each geographic area. The bill also provides a pathway for the agencies to improve collaboration with states and local governments in order to enhance clarity and certainty in the rulemaking. With 37 states having voiced some degree of opposition during the notice-and-comment period, the collaboration requirement would give EPA an opportunity to more fully address serious concerns and make significant changes to the rule where needed.

Any clarification of CWA jurisdiction should be supported by a sound scientific basis and adequate consideration of concerns from all those affected, including states and stakeholder groups. Since the current "waters of the U.S." rulemaking falls well short of those goals, it should be revised accordingly before EPA moves forward.

ACC strongly urges you to vote "yes" on S. 1140, the Federal Water Quality Protection Act.

Sincerely,

Cal Dooley

S. 1140 Federal Water Quality Protection Act Summary

EPA and the Corps of Engineers have proposed to expand the scope of federal authority over land and water to encompass all water in a flood plain, manmade water management systems, and water that infiltrates into the ground or moves overland, and any other water that they decide has a "significant nexus" to downstream water based on use by animals, insects and birds and water storage considerations, shifting the focus of the Clean Water Act from water quality protection and navigable waters to habitat and water supply.

To address these concerns and to ensure protection of water for communities across the country, the Federal Water Quality Protection Act directs the agencies to issue a revised proposal that adheres to the following principles-

- ✓ The Federal Water Pollution Control Act is an Act to protect traditional navigable waters from water pollution.
- ✓ Waters of the U.S. under that Act should *include*
  - Traditional navigable waters and interstate waters.
  - Streams identified on maps at the scale used by EPA to identify potential sources of drinking water.
  - Streams with enough flow to carry pollutants to a navigable water, based on a quantifiable and statistically valid measure of flow for that geographic area, and
  - Wetlands situated next to a water of the United States that protect water quality by preventing the movement of pollutants to navigable water.
  - Areas unlawfully filled without a required permit.
- ✓ Waters of the U.S. should *not include*
  - Water that is located below the surface of the land, including soil water and groundwater.
  - Water that is not located within a body of water (e.g., river, stream, lake, pond, wetland), including channels that have no bed, bank or ordinary high water mark or surface hydrologic connection to traditional navigable waters.
  - Isolated ponds.
  - Stormwater and floodwater management systems.
  - Wastewater management systems.
  - Municipal and industrial water supply management systems.
  - Agricultural water management systems.
  - Streams that do not have enough flow to carry pollutants to navigable waters.
  - Prior converted cropland.
  - Areas lawfully filled pursuant to a permit or areas exempt from permitting.

In identifying waters of the U.S., the agencies are directed that the following do not provide a basis for asserting federal control-

- ✓ The use of a body of water by an organism, including a migratory bird.
- ✓ The supply of water to a groundwater aquifer and the storage of water in an isolated waterbody.

- ✓ The water cycle, including the supply of water through evaporation, transpiration, condensation, precipitation, overland flow, and movement of water in an aquifer.

Directly contradicting states, local governments, and the Chief Counsel for the Small Business Administration Office of Advocacy, EPA and the Corps of Engineers claim that the proposed definition of "waters of the United States:"

- ✓ Imposes no direct costs.
- ✓ Is not a major rule.
- ✓ Creates no unfunded mandates.
- ✓ Requires no Regulatory Flexibility Act analysis.
- ✓ Affects no small entities.
- ✓ Affects no other levels of government.
- ✓ Has no Federalism implications.

By making those claims the Corps and EPA evaded important analyses and consultations that could have greatly improved the proposed rule. To address this significant flaw in the development of the proposed rule, a new regulatory proposal must be developed employing the following-

- ✓ Review and response to comments on the 2014 regulatory proposal.
- ✓ Federalism consultation under Executive Order 13132.
- ✓ Economic analyses under the Regulatory Flexibility Act.
- ✓ Small business and small governmental entity review under the Small Business Regulatory Enforcement Fairness Act.
- ✓ Review of the unfunded mandates under the Unfunded Mandates Reform Act.
- ✓ Compliance with Executive Orders 12866 and 13563, on improving regulation.
- ✓ A report to Congress on these actions

Need For S. 1140 the "Federal Water Quality Protection Act"

February 4, 2015 Senate Environment and Public Works Committee and House Transportation and Infrastructure Committee Hearing:

Mr. GIBBS. You keep saying that you will fix things in the final rule, that the questions have been raised. Will you do a supplemental proposal so the public will have a chance to review that before you do the final rule, then, since there has been so many questions raised about what sort of things are going to get fixed in the final rule?

Ms. MCCARTHY. [A]supplemental would only be required if we certainly go outside the boundaries of what we have already teed up in the proposal. And at this point we intend to finalize the rule.

PROMISES MADE BY AGENCIES	**PROMISES KEPT BY S. 1140**
June 11, 2014, testimony by Deputy Administrator Perciasepe that wet spots and puddles are not waters of the United States.	Definition of body of water as a traditional navigable water, territorial sea, river, stream, lake, pond, or wetland; requirement that to be regulated water must be within a body of water.
February 4, 2015, testimony by Secretary Darcy that a quarry that is connected to groundwater is isolated and therefore not a water of the United States, and testimony by Secretary Darcy and Administrator McCarthy that isolated ponds not connected to other waters are not regulated.	Definition of isolated as the absence of a surface hydrologic connection to a traditional navigable water; exclusion for isolated ponds; prohibition on use of groundwater as a connection that creates federal control over water.
February 4, 2015 testimony by Secretary Darcy that only those waters that flow into a traditional navigable water, interstate water, or territorial sea are jurisdictional as tributaries.	Requirement for continuous surface connection to traditional navigable water.
February 4, 2015, testimony by Administrator McCarthy that "all of the construction that is done to protect stormwater is extremely important to recognize, incentivize, and not confuse." McCarthy: EPA intends to maintain the longstanding exclusion of waste treatment systems. McCarthy: "EPA has not intended to capture features that have already been captured in what we call MS4 permits," and it is their intent "to also encourage water reuse and recycling." March 16, 2015 speech to National Farmers' Union: "We're not interested in the vast majority of ditches—roadside ditches, irrigation ditches—those were never covered."	Exclusions for stormwater, wastewater, water supply and agricultural and silvicultural water systems, unless built without a required permit or unless built in a navigable water without meeting the terms of an agricultural exemption, the waste treatment exemption, or a permit (such as an MS4 permit) that identifies the system as a point source.

February 4, 2015, question to Administrator McCarthy on "how the use of water by a bird or animal can be a legal basis for regulating water under the Clean Water Act?" Response: "It is my understanding that that is not sufficient as a sole reason for jurisdiction. And that was indicated by the Supreme Court."	Bar on reliance on use of water by birds and other organisms to establish connections that create federal control over water.
February 4, 2015, testimony by Administrator McCarthy: "approximately 117 million people get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams." "I think that is the challenge, is for us to recognize what tributaries are significant contributors enough that they can impact navigable waters." "The definition of 'tributary' and how it relates to ephemeral streams is extremely important, how that all relates to erosional features that are exempt, are excluded, from the Clean Water Act jurisdiction." "Let me mention the ephemeral washes, because the significant issue for us is: When does an ephemeral flow? When is it sufficient duration and intensity and frequency that it has an opportunity to impact the quality of the water that is downstream?" February 4, 2015, testimony by Administrator McCarthy: "It has to be a significant connection where that water supply or that water body, wetland, or system would be able to significantly **impact and degrade the downstream waters.**" March 16, 2015 speech to National Farmers' Union: "Again, we don't want to protect water that isn't of significant concern to downstream waters."	Inclusion for reaches of streams identified on maps at the scale EPA used to identify reaches of streams that are sources of drinking water. The maps are a baseline from which streams can then be included or excluded based on whether the volume, duration, and frequency of flow in the stream would be able to carry pollutants that would impact and degrade that navigable water. Requirement for the Corps of Engineers, following notice and an opportunity for comment, to establish measures of flow for streams in different geographic areas to determine if pollutants could reach navigable water. Bar on reliance on water storage functions or the water cycle (rather than protection of navigable water from pollutants) to establish connections that create federal control over water.
April 6, 2015, blog from McCarthy and Darcy: "The rule will protect wetlands that are situated next to protected waterways like rivers and lakes, because science shows us they impact downstream waters."	Requirement to protect wetlands next to waters of the U.S. where they prevent the movement of pollutants to navigable waters.

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